

Page 1

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

4 - - - - - x

5 In re:

6

7 SEARS HOLDINGS CORPORATION,

8

9 Debtor.

10 - - - - - x

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12

13 United States Bankruptcy Court

14 300 Quarropas Street, Room 248

15 White Plains, NY 10601

16

17 April 23, 2020

18 10:00 AM

19

20

21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: UNKNOWN

Page 2

1 Hearing re: Notice of Agenda of Matters Scheduled for
2 Telephonic Hearing on April 23, 2020 at 10:00 a.m.

3

4 Amended motion for Reconsideration and Request for an
5 Enlargement of Time to File an Appeal Pending this Motion
6 (related document(s)51) filed by Brian Coke Ng (document
7 #52)

8

9 Motion for Reconsideration (document #51)

10

11 Objection to Motion/Objection of PDX, Inc. and National
12 Health Information Network, Inc., to the Motion of Brian
13 Coke Ng Pursuant to Rule 60(b) for Relief from Order and
14 Request for an Enlargement of Time to File an Appeal Pending
15 this Motion (related document(s)52)

16

17 Affidavit/Reply Affidavit and Further Memorandum in Support
18 (related document(s)52) filed by Brian Coke Ng (document
19 #55)

20

21 Debtors' Motion for Entry of an Order Approving Settlement
22 Agreement Among Sears Holdings Corporation and the Canadian
23 Plaintiffs (ECF #7518)

24

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Page 3

1 Application to Appoint to Retain and Employ Moritt Hock &
2 Hamroff LLP as Special Conflicts Counsel, Effective Nunc Pro
3 Tunc to January 2, 2020 filed by Ted A. Berkowitz on behalf
4 of Official Committee of Unsecured Creditors of Sears
5 Holdings Corporation, et al. (ECF #7798)

6

7 Debtors Second Omnibus Objection to Proofs of Claim
8 (Reclassification as General Unsecured Claims) (ECF #4776)

9

10 Claimant's Response to Omnibus Objection Re: Claim no. 5472
11 (related document(s)4776) filed by Georgia Watersports, LLC
12 (ECF No. 4814)

13

14 Response of VM Innovations to Second Omnibus Objection to
15 Proofs of Claim (ECF No. 4986)

16

17 Objection to Suzanne Jewelers (ECF No. 4994)

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19 Response of ShopChimney.com to Second Omnibus Objection to
20 Proofs of Claim (ECF No. 5003)

21

22 Response of VIR Ventures, Inc. to Second Omnibus Objection
23 to Proofs of Claim (ECF No. 5056)

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Page 4

1 Response of Sky Billiards, Inc., d/b/a Best Choice Products
2 in Opposition to Debtors' Second Omnibus Objection (ECF No.
3 5421)

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5 Response of Stolaas Company in Opposition to Debtors' Second
6 Omnibus Objection to Proofs of Claim (ECF No. 5524)

7

8 Motion to Extend Time to Respond filed by Myrna Ruiz-Olmo on
9 behalf of Puerto Rico Supplies Group, Inc. (ECF #7788)

10

11 Motion of Relator Carl Ireland, Administrator of the Estate
12 of James Garbe, for an Order (I) Determining the Value of
13 Relator's Collateral as of the Sale of Such Collateral; (II)
14 Determining the Amount of Any Diminution in the Amount of
15 the Sales Proceeds Allocable to Such Collateral After the
16 Sale; (III) Directing Payment of Relator's Secured and
17 Superpriority Administrative Claims; and (IV) Granting
18 Related Relief filed by Alan D. Halperin on behalf of
19 Relator Carl Ireland, Administrator of the Estate of James
20 Garbe (ECF #4931)

21

22 Debtors' Objection (ECF #7471)

23

24 Letter on behalf of the United States of America to join in
25 the motion (ECF #7836)

1 Administrative Claim Status Conference

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3 Debtors' Tenth Omnibus Objection to Proofs of Claim (To
4 Reclassify Claims) (ECF #5237)

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6 Debtors' Eleventh Omnibus Objection to Proofs of Claim (To
7 Reclassify or Disallow Certain Claims) (ECF #7213)

8

9 Motion for Relief from Stay filed by Sonia E. Colo on behalf
10 of Santa Rosa Mall, LLC (ECF #6317)

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12 Debtors' Objection (ECF #7211)

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14 Reply to Debtors' Objection filed by Sonia E. Colon on
15 behalf of Santa Rosa Mall, LLC. (ECF #7311)

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17 Statement Certifying Compliance (related document(s)6316,
18 6317) filed by Sonia E. Colon on behalf of Santa Rosa Mall,
19 LLC. (ECF #7326)

20

21 Memorandum of Law on Puerto Rico's Insurance Law in
22 Compliance with Court Order (related document(s)6317, 7311,
23 7211) filed by Sonia E. Colon on behalf of Santa Rosa Mall,
24 LLC. (ECF 7531)

25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :
2
3 WEIL, GOTSHAL & MANGES
4 Attorney for the Debtors
5
6 767 Fifth Avenue
7
8 New York, NY 10153
9
10 BY: GARRETT FAIL
11 JACQUELINE MARCUS
12
13 KIRBY AISNER & CURLEY, LLP
14
15 Attorney for PDX, Inc.
16 700 Post Rd Suite 237
17 Scarsdale, NY 10583
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19 BY: JULIE CURLEY
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22 HALPERIN BATTAGLIA BENZIJA
23 Attorney for Relator, Carl Ireland
24 40 Wall Street
25 New York, NY 10005
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1 U.S. DEPARTMENT OF JUSTICE
2 Attorney for the United States Trustee
3 U.S. Federal Office Building
4 201 Varick Street, Suite 1006
5 New York, NY 10014

6

7 BY: LAWRENCE FOGELMAN

8

9 DAVIDOFF HUTCHER & CITRON
10 Attorney for Orient Craft Limited and HK Sino-Thai
11 Trading Company Limited.
12 605 3rd Avenue
13 New York, NY 10158

14

15 BY: DAVID WANDER

16

17 BERNSTEIN-BURKLEY
18 Attorney for Vir Ventures and AMI Ventures
19 707 Grant Street, #2200
20 Pittsburgh, PA 15219

21

22 BY: SALENE MAZUR KRAEMER

23

24

25

Page 8

1 MORRISON & FOERSTER

2 Attorney for Icon Health and Fitness

3 250 W 55th Street

4 New York, NY 10019

5

6 BY: BEN BUTTERFIELD

7

8 ARENT FOX LLP

9 Attorney for Sky Billiards

10 1301 Avenue of the Americas, 42nd Floor

11 New York, NY 10019

12

13 BY: DOUG FLAHAUT

14

15 FOLEY & LARDNER LLP

16 Attorney for Hain Capital Investors Master Fund, Ltd

17 90 Park Avenue

18 New York, NY 10016-1314

19

20 BY: PAUL J. LABOV

21

22

23

24

25

Page 9

1 RÍOS GAUTIER & CESTERO C.S.P.

2 Attorney for Santa Rosa Mall, LLC

3 27 González Giusti Street, Suite 300

4 Guaynabo, PR 00968-3076

5

6 BY: CARLOS RIOS

7

8 FERRAIUOLI LLC

9 Attorneys for Santa Rosa Mall

10 221 Avenida de la Constitución

11 San Juan, 00917, Puerto Rico

12

13 BY: SONIA COLON

14 CARLOS RIOS

15 GUSTAVO CHICO

16

17 BRIAN COKE NG

18

19

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P R O C E E D I N G S

2 THE COURT: Hello, good morning. This is Judge
3 Drain, and this is the omnibus hearing date for matters in
4 Sears Holdings Corporation, et al. This is a completely
5 telephonic hearing, so not only will I ask you to identify
6 yourself and your client when you first speak, I may also
7 ask you later while you're speaking to do the same thing
8 again if I think that the court reporter taking down the
9 official recording from Court Solutions may not be able to
10 identify you.

11 One last point, there is one recording permitted
12 of this set of hearings; that's the official recording being
13 undertaken by Court Solutions. No one should separately be
14 recording this hearing.

15 With that introduction, I'm happy then to proceed
16 on the agenda, the amended version of which was filed
17 yesterday.

18 MR. FAIL: Good morning, Your Honor. For the
19 record, Garrett Fail, Weil, Gotshal & Manges for the
20 Debtors. That's right, the agenda was filed at Docket
21 #7857. Before beginning, we hope the Court and its staff
22 are well and appreciate the Court's time and thank the Court
23 for the time this morning.

24 Unless the Court prefers to proceed in a different
25 fashion, we could proceed in the order in which items appear

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1 on the agenda, which would begin with the adversary
2 proceeding first, the Brian Coke Ng v. Sears Holding
3 Corporation, et al; it's Item #1 on the agenda.

4 THE COURT: Right, that's fine. Let's do that.

5 And that matter is a motion by Mr. Ng -- that's spelled N-G
6 for the court reporter's benefit -- for reconsideration of
7 an order that I entered on April 9, 2020 in which I did two
8 things: I relieved PDX, Inc. and National Health
9 Information, which I'll refer to as PDX/NHIN or PDX, of a
10 default in this adversary proceeding under Federal Rule of
11 Bankruptcy Procedure 7055, and also granted PDX/NHIN's
12 motion to dismiss the claims against it in the adversary
13 proceeding brought by Mr. Ng.

14 The hearing on that matter was conducted by me
15 telephonically. And during the hearing I asked a number of
16 times whether Mr. Ng was present. He had expressed a
17 serious interest in participating in that hearing. And I am
18 aware of email correspondence with the Clerk's Office -- or
19 I was aware at the time of email correspondence with the
20 Clerk's Office instructing him how to sign on to Court
21 Solutions. Notwithstanding that, he was not present at the
22 hearing, and I proceeded just with counsel for the movant,
23 PDX/NHIN.

24 Mr. Ng filed his motion almost immediately after
25 the order was entered, stating that he attempted to be

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1 present at the hearing and was not and sought
2 reconsideration on that basis.

3 I see from the dashboard, Mr. Ng, that you are
4 present today.

5 MR. NG: Yes, Your Honor. Good morning. Thanks
6 for having me. I finally got here. I was present. I did
7 call in at the last hearing, but I was placed on mute, and I
8 did not have all of the protocols with me at the time to
9 know everything that is required of me to properly enter
10 through the dashboard. I was signed up by the defense
11 counsel.

12 I felt somewhat disappointed because no one called
13 me to advise me when the Court already sent me an email,
14 which I received later in the day, that there would be a
15 waiver. And so, I felt very not much -- not happy because I
16 have a complaint that I had filed and I wanted to address
17 the complaint, along with some procedural issues on the part
18 of the PDX defendants. So I'm --

19 THE COURT: Okay. But before we go further, Mr.
20 Ng, let me take the other appearances on this particular
21 matter.

22 MR. NG: Yes. Yes, Your Honor.

23 MS. CURLEY: Thank you, Judge. Julie Curley of
24 Kirby Aisner & Curley, LLP for defendants, PDX, Inc. and
25 National Health Information Network, Inc.

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1 THE COURT: Okay, very well. I don't think anyone
2 else is appearing on this particular motion. So, Mr. Ng,
3 let me go back to you. We received an email well after the
4 Sears hearing ended -- and it was an omnibus hearing; there
5 were more matters on the calendar than just this one -- that
6 you were still on the phone and were wondering what was
7 going on. Did you hear my ruling at the hearing and the
8 discussion?

9 MR. NG: No, Your Honor. I heard nothing.

10 THE COURT: Okay.

11 MR. NG: I heard nothing other than from the
12 beginning when I first call in, I got a good morning
13 message, a good morning greeting, and that greeting shortly
14 thereafter placed me on mute. I was there waiting until
15 sometime after midday or so that same day and I became
16 curious. I thought then perhaps the Court was busy with
17 other cases and so I continued to wait.

18 THE COURT: Okay.

19 MR. NG: And I finally sent an email.

20 THE COURT: Okay, and I got that email. I do want
21 to note two things, Mr. Ng. I get the dashboard that shows
22 each person that's on the call --

23 MR. NG: Yes, Your Honor.

24 THE COURT: -- and also the clerk's office does
25 too. And that dashboard showed you on the call at the very

1 beginning briefly before the hearing started and then did
2 not show you thereafter, including at the end. And I now
3 have your icon and you are -- you're obviously showing up
4 now, and the fact that someone is muted doesn't take them
5 out of the dashboard. So I'm not sure what happened, but I
6 don't think there's anything particularly nefarious that
7 went on here. It's just that you weren't able to
8 participate in the hearing; that's clear. And in light of
9 that, I decided to schedule a hearing on your motion.

10 I know you're representing yourself and you're not
11 a lawyer, but under the local rules and the bankruptcy
12 rules, the court does not need to schedule a hearing on a
13 motion under Bankruptcy Rules 9023 and 7024, which
14 incorporate the Federal Rules 59 and 60, if it believes
15 there's really no purpose to be served by a hearing. But I
16 felt that since you had not participated in the earlier
17 hearing, that there would be a purpose served, so that's why
18 I scheduled this hearing.

19 So I have one more question for you, and then I'm
20 going to ask you just to briefly address your opposition to
21 the motion that was made by PDX/NHIN to dismiss. And that
22 question is, have you been able to get the transcript of my
23 ruling, because I gave quite a lengthy ruling at the end of
24 the prior hearing.

25 MR. NG: Well, I request it, Your Honor.

1 THE COURT: Right.

2 MR. NG: And I was promised in an email that
3 somehow that request was somehow end up in a spam box, and
4 that I will be -- they will respond to my request within a
5 day, and that was earlier on several days ago. And I have
6 not heard anything back from anyone pertaining to the
7 transcript, so I do not have a copy, Your Honor.

8 THE COURT: You haven't reviewed the transcript.

9 MR. NG: I haven't seen it.

10 THE COURT: Okay. And unless one asks for an
11 emergency transcript, it usually takes them a while to
12 prepare it, so I'm not surprised that you haven't seen it,
13 but I just really wanted to know as to the state of your
14 knowledge of my ruling.

15 MR. NG: No, I have no knowledge of --

16 THE COURT: Okay.

17 MR. NG: It just here and I heard that there was a
18 transcript and I requested and I have not gotten it
19 whatsoever.

20 THE COURT: Okay, very well. So given that, I
21 want to let you know I did read your objection to PDX's
22 motion to dismiss carefully, including the exhibits, as well
23 as the underlying Complaint that they sought to dismiss.

24 MR. NG: Yes.

25 THE COURT: So I'm familiar with all of those

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1 documents, as well as, of course, PDX's motion. But if you
2 want to say anything more on top of those documents in
3 opposition to the motion, now is your chance.

4 MR. NG: Yes, Your Honor. I'm happy to say
5 something on it.

6 So the complaint was filed, and it is my belief --
7 I'm not an attorney and only pro se, and I'm not someone who
8 can artfully plead like an attorney. But what I do
9 understand, Your Honor, is that what I would like to say,
10 that my complaint is well pled under the Rule 8 -- Rule
11 8(a), with the accompanying factual allegations I'm showing
12 of the harm. It relates to negligence. That's the primary
13 complaint that I have.

14 But the PDX defendants is simply ignoring the
15 portion of the complaint that they do not like. Like I
16 said, it's negligence. I understand that long ago that a
17 complaint must specify who, what, when, where and how, but
18 it went -- my complaint went further than that.

19 For example, I had alleged four elements of the
20 negligence that I pled, and I had declared those elements of
21 the negligence and applied them to the PDX defendants, but I
22 had -- I did not stop there. I put forward a factual basis
23 of the claim establishing, including how the PDX negligence
24 occurred and how the damages occurred.

25 I must point out also, Your Honor, that -- and I

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1 would like to point you to the complaint itself. At
2 Paragraph 118, I expressed everything concerning the
3 standard of care that was owed to me. I also expressed and
4 explained in Paragraph 118 also that PDX owed me a duty.

5 The factual allegation actually showing the
6 standard of care that is owed in Paragraphs 16, 17, 19 and
7 118. And so, I believe that was just covered in the -- that
8 covered the first element of the negligence, Your Honor.

9 I had also alleged specifically in the complaint
10 at Paragraph 4, 41, 42, 43, 44 and 45, also 115 and 118, 119
11 and 120, that the PDX defendants had breached that duty of
12 care. And so, with that, I didn't stop there. I went on
13 with the other paragraph -- Paragraphs 2, 41, 47, 48, 68,
14 69, 70, 86, 87, 91, 116 and 117 to show and to explain the
15 injury that I had -- that I had -- that came about and
16 developed as a result of the negligence.

17 And then to sum it up and to finalize the
18 negligence, I had also alleged in Paragraphs 2, 41, 48, 69,
19 85, 86, 87, 91, 115, 116, 117 and 124, the injuries that
20 result from the PDX breach of duty, Your Honor.

21 But one other thing with related which I would
22 like to touch on. The issues about the -- I'm sorry -- the
23 issues about the product liability, all of that was just
24 part of the negligence complaint that I have. My main
25 complaint, Your Honor, is about negligence and the injuries

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1 related to emotional distress and the asthma attacks that I
2 have been suffering until this moment, Your Honor, all of
3 that is a part of the injuries that I had sustained.

4 So I tried to be artful as possible to make the
5 case for the negligence because I know very well that it has
6 -- there are four elements to it, which I detailed to you
7 just a short while ago in the paragraph as I had placed
8 them, and I didn't stop there. I also showed the factual
9 basis for bringing those elements to the forefront of the
10 Court.

11 THE COURT: Okay, all right. I think at this
12 point, you're repeating what you told me earlier, so you
13 don't need to do it again.

14 MR. NG: Okay. Okay, Your Honor.

15 THE COURT: Okay.

16 MR. NG: So one other thing I would like to touch
17 on is that there seems to be a matter related to the
18 procedural efforts that the PDX defendants had made. In
19 July of 2019, they made their first motion to dismiss, Your
20 Honor. And with respect to that notice of motion, they did
21 raise that Rule 12(b)(6) motion; in fact, they said that
22 they were making the motion for an order to dismiss under
23 the (b)(12) -- I mean, under the Rule 12 -- Rule 12(b)(6).

24 However, they made just few, just very little
25 address of what the claims were at that time, but they

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1 didn't go forward with it. Instead, they stick to what they
2 were intended to do, I believe, that was for the
3 jurisdiction, dismissing the complaint for personal
4 jurisdiction. I'm sorry.

5 And because that had been raised, I believe that
6 at that time when they raised that first motion, they could
7 have include the other defense as well and consolidate them
8 under the Rule 12 -- under the rules of those defense that
9 they have. They could have consolidated them, but they did
10 not, they choose not. However, the Court made a decision
11 which denied that personal jurisdiction request -- motion
12 that they had set forth.

13 And I believe when that decision was handed out
14 and filed with the Court in December 2nd, I believe from the
15 rules that they have only 14 days to either plead or to
16 answer the Complaint. They had not made any request or move
17 the Court to seek an extension of time to either plead or
18 answer the Complaint and so, the time expired.

19 They were supposed to answer 14 days; they end up
20 answered January 16. And I believe, Your Honor, that I
21 should be protected -- I should be protected by that under
22 the Rule 12 -- Rule 12 for -- let me see what I have here --
23 under that rule that actually gives them -- granted them
24 that time to respond or to plead, if you understand what I'm
25 trying to say here.

1 THE COURT: Yes. No, I do. I do, and you made
2 that point clearly in your objection to their motion.

3 MR. NG: Yes, Your Honor. So for me not to be
4 able to protect it -- and, in fact, that's why I seek the
5 Court to enter default. And that was just one day later,
6 they quickly went, and they filed a motion to dismiss, which
7 they never even respond to the motion -- to the clerk's
8 default entry. They didn't make any response. They just
9 figured then, well, the time was not -- the motion was not
10 untimely. Nobody says that, but them not making any
11 response, I don't feel comfortable yet, Your Honor, because
12 I believe that I was protected by the Rule 12(a) --
13 (a)(4)(a).

14 THE COURT: Mr. Ng, following the date after the
15 14 days ran, did you take any action in reliance on the
16 default?

17 MR. NG: Well, the action related to the default,
18 I understand that I have a time to -- after the Court make
19 that decision to enter the default, I understand that I have
20 a specific time. I don't remember the exact timeframe as to
21 move for an order for default judgment. So I believe I'm
22 still within that time, Your Honor, but, again, I don't
23 remember the exact time because I tried to seek as much help
24 as to get proper information as well. But I don't have that
25 time that is allowed for making that judgment -- for that

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1 motion for a default judgment.

2 THE COURT: Okay.

3 MR. NG: So I'm not satisfied, Your Honor, that
4 I'm not protected by that Rule 12, because with everything
5 else within the Court, respectfully, the Court ruled by
6 rules and strict rules. And so, you know, I feel that that
7 should be considered, Your Honor, with all respect due.

8 THE COURT: All right.

9 MR. NG: I believe that with all respect due. And
10 I'm not trying to make a big deal out of anything other than
11 I believe I have been so mistreated by all the defendants
12 actually because I'm the person actually suffering. I have
13 bills piled up on me over the same issues, and it's not like
14 I'm not suffering. I'm suffering very deeply. And so, with
15 this case, it's hard to digest that something could have
16 gone so, you know, in such a direction that nobody cares to
17 find a way to resolve it, and I have to be fighting over
18 pretty much my civil rights and my private rights over
19 simple medical records.

20 THE COURT: Okay.

21 MR. NG: And so, at this stage that, you know, I
22 don't -- I don't know really.

23 THE COURT: All right. So let me ask, Miss
24 Curley, do you want to respond or do you want to stand on
25 your prior pleadings?

1 MS. CURLEY: Your Honor, I'll stand on my prior
2 pleadings, as well as what I had said in a prior hearing
3 that, because there is a legitimate defense -- grounds exist
4 for the motion to dismiss the complaint, that there is cause
5 to vacate the default, and then hear the motion to dismiss,
6 which the Court had granted at the last hearing.

7 THE COURT: Okay, very well.

8 MS. CURLEY: Thank you.

9 THE COURT: All right. I have before me the
10 plaintiff's motion in this adversary proceeding to
11 reconsider and vacate my April 9th, 2020 order, which, as I
12 said, introducing this matter did two things. First, it
13 vacated the entry of default by the clerk's office under
14 Bankruptcy Rule 7055 against the remaining defendant,
15 PDX/NHIN; and secondly, it granted PDX/NHIN's motion to
16 dismiss all of the claims in the complaint against it.

17 As I noted at the beginning of this hearing, that
18 was a -- the hearing that resulted in that order was a
19 telephonic hearing and Mr. Ng was not able or did not speak
20 at that hearing. I don't believe it was through any
21 intentional fault on his own or on any other one's part.
22 But given that he is pro se and given the fact that he did
23 not get his chance to speak, in addition to the extensive
24 objection that he filed, I believed it was warranted to
25 schedule this hearing on his motion today to hear him.

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1 Normally, motions under Bankruptcy Rules 9023 and
2 9024, to vacate a prior order of the court, are viewed as
3 seeking an extraordinary remedy to be employed sparingly in
4 the interest of finality and the conservation of judicial
5 resources. Motions for reconsideration under Bankruptcy
6 Rule 9023, which incorporates Federal Rule of Civil
7 Procedure 59, are not normally granted unless the moving
8 party can point to controlling decisions or facts that the
9 court overlooked; matters, in other words, that might
10 reasonably expect to alter the conclusion reached by the
11 court. Zuma Press, Inc. v. Getty Images (USA), Inc., 2019
12 US Dist. LEXIS 12415 at Page 2 (S.D.N.Y. January 24, 2019),
13 citing, among other cases, Key Mechanical Inc. v. BDC 56
14 LLC., 330 F.3d 111, 123 (2nd Cir. 2003).

15 In addition, I've treated this as a potential
16 request under Bankruptcy Rule 9024, which incorporates
17 Federal Rules of Civil Procedure 60(b). That rule provides
18 that a party can obtain relief from judgment on the
19 following grounds: mistake, inadvertent surprise or
20 excusable neglect; two, newly discovered evidence; three,
21 fraud, misrepresentation or misconduct by an opposing party;
22 four, the judgment is void; five, the judgment has been
23 satisfied, released or discharged; or, six, any other reason
24 that justifies relief.

25 Rule 60(b), "strikes a balance between serving the

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1 ends of justice and preserving the finality of judgments".
2 Nemaizer v. Baker, 793 F.2d 58, 61 (2nd Cir. 1986). Courts
3 should not lightly reopen final judgments under Rule 60(b),
4 Id. See also In re Lehman Brothers Holdings, Inc., 445 B.R.
5 143, 168 (Bank. S.D.N.Y. 2011). And it should not be used
6 as a substitute for a timely appeal, and it is invoked only
7 upon a showing of exceptional circumstances, Id. See also
8 United States v. International Brotherhood of Teamsters, 247
9 F.3d 373, 391 (2nd Cir. 2001), although ultimately, the
10 decision whether to grant such relief lies with the sound
11 discretion of the court.

12 Here, potentially categories one, that is mistake,
13 inadvertent surprise or excusable neglect; two, newly
14 discovered evidence; three, fraud, misrepresentation or
15 misconduct by an opposing party; or, six, any other reason
16 that justifies relief have been asserted as potential
17 grounds. Here, there is, as stated, no newly discovered
18 evidence; in fact, Mr. Ng was quite clear in laying out in
19 summary form the basis for his objection, which he had filed
20 previously in more voluminous form and that I considered in
21 connection with my original ruling.

22 The response to the objection to this motion
23 alleges misconduct by PDX in setting up the phone call. But
24 it appears to me that such an allegation, i.e., fraud,
25 misrepresentation or misconduct, sets forth a high burden.

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1 As stated in the case law, the movant has the burden to
2 establish, by clear and convincing evidence, that the
3 adverse party obtained the judgment through fraud,
4 misrepresentation or other misconduct. See *In re Old Carco,*
5 LLC, 423 B.R. 50-51 (Bankr. S.D.N.Y. 2010) and the cases
6 cited therein. And it does not appear to me, based on my
7 own recollection of the Dashboard and the correspondence
8 with chambers that there was misconduct that has been shown
9 by clear and convincing evidence here.

10 In any event, I have given Mr. Ng the chance to
11 participate in what in essence would have been or is a
12 replay of the hearing that I previously had, which would be
13 the only other reason that might justify relief under
14 60(b)(6), given that this catch-all provision cannot apply
15 if one or more of the specific clauses of Rule 60(b) will
16 not justify relief under that provision. Again, see *United*
17 *States v. International Brotherhood of Teamsters*, 247 F.3d
18 370, 390-92 (2nd Cir. 2011), citing *Liljeberg v. Health*
19 *Services Acquisition Corp.*, 486 U.S. 847, 863 (1988).

20 In addition, I have not heard any new evidence
21 that was not raised before or could have been raised before.
22 And that leaves me with whether any exercise of my
23 discretion I believe I made a mistake in my ruling based on
24 my review of the pleadings, including the underlying
25 complaint. Mistakes can include both legal and factual

1 mistakes by the Court.

2 Here, given that this was a motion to dismiss, it
3 would only be a potential legal mistake. And I considered,
4 after having heard Mr. Ng, whether that might apply here.
5 Again, for the interpretation of Rule 60(b)(1), see In re
6 Old Carco, LLC, 423 B.R. 45-46 and the cases cited therein.
7 I thought carefully about that, but I conclude that the
8 order was properly entered.

9 Let me deal with the motion to dismiss first. I
10 carefully reviewed the complaint and went through the
11 elements of the underlying causes of action and then applied
12 the factual allegations in the complaint to those elements
13 and I believe laid out in some detail in my bench ruling why
14 here I believe the complaint did not state a cause of action
15 that was plausible, including under negligence.

16 The basic proposition on the negligence point was
17 that the allegedly negligent action by PDX was to have
18 provided Mr. Ng with certain records that it had regarding
19 prescriptions filled for him that were (a) not originally
20 provided and then were later provided and when later
21 provided that conflicted with, i.e., were different from
22 information he had previously received regarding the
23 prescriptions.

24 I concluded that as far as the negligence cause of
25 action was concerned, the facts alleged did not establish a

1 duty of care with respect to those facts nor approximate
2 cause, given that the primary conflict was in the nature of
3 the warnings with respect to prescriptions that were
4 prescribed medically, and that one would not reasonably
5 expect or plausibly expect that to have caused the
6 psychological reactions that Mr. Ng's complaint details.

7 The other causes of action, which Mr. Ng has not
8 dealt with at today's hearing but did in his objection, I
9 separately addressed, and I believe was not mistaken in
10 addressing in my bench ruling denying those causes of
11 action.

12 Finally, the second part of my ruling was that PDX
13 should be relieved of the default that the clerk's office
14 entered here. The default was entered correctly, as Mr. Ng
15 noted both in his objection and at oral argument. After PDX
16 lost its initial motion to dismiss, which was solely on the
17 grounds of lack of personal jurisdiction, it had a specified
18 time under the bankruptcy rules to answer the complaint or
19 otherwise move. It was late in that by approximately a
20 month and the notice of default was properly entered under
21 Bankruptcy Rule 7055. However, this rule is only the first
22 step in a default, unless the complaint is for a sum
23 certain, which was not the case here.

24 In addition, the plaintiff needs to move for a
25 default judgment, which had not yet been done, and I don't

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1 fault Mr. Ng for doing that. He's correct in saying that
2 his time to make such a motion had not expired by the time
3 that the defendant had made its second motion to dismiss.
4 But that fact is relevant to the proper analysis of a
5 request to be relieved of a default under Federal Rule of
6 Civil Procedure 55.

7 The courts generally act or approach a request to
8 be relieved of a default with the following factors: whether
9 the default was willful or culpable; whether granting relief
10 from the default would prejudice the opposing party, in this
11 case, Mr. Ng; and whether defaulting party has a meritorious
12 defense. Those factors guide the court in the exercise of
13 its discretion, although courts are generally well advised
14 by the proposition that the courts prefer matters to be
15 decided on their merits.

16 Here, I concluded that the default was not willful
17 or culpable, which is related to the second point, which is
18 that there was no prejudice to Mr. Ng in that he had not yet
19 moved for entry of a default judgment, nor had any other
20 step in the adversary proceeding taken place. And further,
21 there was sufficient time for addressing all of the issues
22 on the merits in the motion to dismiss. And there, it was
23 clear to me that, in fact, the defendant did have a
24 meritorious defense to each of the causes of action in the
25 complaint.

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1 So in light of that, I was prepared to grant the
2 request by PDX for relief from the default, and I don't
3 believe on today's record that that should be changed. Of
4 course, Mr. Ng has his right to appeal and by saying that I
5 didn't make a mistake I'm not concluding that there wasn't a
6 mistake, but as far as a motion under Rule 9023 or 9024 is
7 concerned, that is dispositive.

8 So I will ask counsel for PDX to submit an order
9 denying the motion for the reasons stated in my bench ruling
10 on the record. I will also ask or work with my clerk's
11 Office, Miss Li work with counsel for PDX and Mr. Ng to get
12 a copy of the transcript of my earlier bench ruling so that
13 the parties can have that promptly.

14 MS. CURLEY: Thank you, Judge. I've been taking
15 notes and I'll start to get an order over this afternoon.

16 THE COURT: Okay, very well. Thank you both.

17 MS. CURLEY: And I'll copy Mr. Ng on the
18 submission of the order.

19 THE COURT: That's fine. Okay. So we should
20 proceed then to the next item on the agenda.

21 MR. FAIL: Thank you, Your Honor, for the record,
22 again, Garret Fail, Weil, Gotshal & Manges.

23 The second item on the agenda is the first of two
24 status conferences that are on for today. The first relates
25 to a motion filed by the Relator Carl Ireland, relating to a

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1 secured claim that was asserted in these cases.

2 Your Honor will recall, this motion was filed
3 eight months ago prior to the sale, prior to confirmation.

4 It's been carried from time to time. The motion originally
5 sought to have the claim value determined, to have proceeds
6 allocated, and to be paid and satisfied.

7 Subsequently to the motion being filed, Your Honor
8 will recall several instances where this issue was discussed
9 in Court, including at the confirmation hearing where,
10 through the confirmation order, this creditor was granted
11 adequate protection for its secured claim with a lien on all
12 assets of the Debtors, which included --

13 THE COURT: I'm sorry, I have the paragraph here,
14 and it's a lien against the sale proceeds of the property
15 and a superpriority administrative expense against all the
16 Debtors that was adequate protection.

17 MR. FAIL: That was at the sale, Your Honor,
18 right?

19 THE COURT: No, that's, I believe, the
20 confirmation order, paragraph 65, if I'm not mistaken. But
21 in any event, there's the superpriority administrative
22 expense claim as well as adequate protection arising from
23 the sale of the property, which was where there had been an
24 earlier lien granted in connection with the sale, to satisfy
25 the diminution in value of the replacement lien post-

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1 closing.

2 MR. FAIL: Right, Your Honor. We cite, in
3 paragraph 65, that they got a lien in our reply that we
4 filed at Docket 7471, confirmation order, paragraph 65,
5 which gave them a replacement lien against total assets
6 defined in the plan as additional adequate assurance, which
7 is senior to other liens against total assets, and doesn't
8 supersede or otherwise modify the sale order grant for the
9 Debtors.

10 THE COURT: I'm not sure about that. My notes
11 have it as just a lien on the property plus the
12 superpriority claim, but it may not matter based on what you
13 --

14 MR. FAIL: I think that was an issue -- that was
15 an issue that was, you know, that was an argument that they
16 were concerned that the proceeds weren't sufficient. And I
17 think to address the issue, we gave the additional liens,
18 Your Honor.

19 THE COURT: Okay, all right.

20 MR. FAIL: It's in total assets. So, you know,
21 from the Debtors' perspective, when we attempted to make the
22 initial distribution pursuant to the confirmation orders
23 approval of the administrative consent program whereby
24 creditors that opted to reduce their administrative expense
25 recoveries by 25 or 20 percent, would receive payments in

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1 advance of the effective date of confirmation, the Relator
2 objected and, again, sought to have payment made on the
3 secured claim. And the Court determined that they were
4 adequately protected, noting, among other things, that to be
5 adequately protected, the Debtors only had to have roughly
6 \$18-, \$20-, \$22 million worth of assets to cover the alleged
7 claim.

8 The Court noted that the litigation, the
9 substantive litigations that the Debtors were pursuing,
10 including preference actions, of which the record is clear
11 that the Debtors have pursued and filed hundreds of causes
12 of action, including the Debtors' claims against D&O
13 proceeds, and including the Debtors' litigation against ESL,
14 you know, were valuable assets of the Debtors'.

15 From the Debtors' position, nothing has changed
16 with respect to that, and the fact that the Relator and the
17 government are now looking at other items that were part of
18 calculations dealt with and addressed at confirmation, you
19 know, we shouldn't be retrying things. This estate is
20 limited. We're trying to move forward. And this Court has
21 already ruled that, from the adequate protection
22 perspective, the estate had long-term assets that provided
23 them this claim with adequate protection.

24 We don't think there's anything else to do or to
25 schedule with respect to this motion. We noted in our reply

1 that, you know, there's a dispute as to the quantum of the
2 claim. I think that the real sticking point to settlement
3 of that is the Relator's and the government's continued
4 desire to be paid in full in cash, immediately and prior to
5 the effective date and from the Debtors' perspective, this
6 issue has been addressed and we don't have to do that.

7 We also note that, you know, the Debtors reserve
8 all rights to dispute the claim, obviously, if the need be,
9 including examination as to whether any of the claims should
10 be actually subordinated, because it's a penalty or a
11 punitive damage claim.

12 But we're hopeful that we don't have to spend a
13 substantial amount of money disputing it. I think that the
14 real issue is that they continue to want payment. Nothing
15 has changed since the confirmation order, it's law of the
16 case. There are no facts and circumstances that change with
17 respect to the pending litigation that's outstanding.

18 That litigation won't be compromised, abandoned or
19 settled or monetized without orders of this Court. Even if
20 it were, then distributions from those proceeds eventually
21 will not go out to creditors unless and until we provide
22 notice to the Court, which hasn't happened, obviously, of
23 course. And so, if circumstances change based on those two
24 factors, perhaps we can revisit. But at this point, we
25 don't think that it's beneficial to the estate or necessary

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1 to protect adequately this secured claim for \$20 million,
2 approximately, to spend any more resources or judicial
3 resources on it. I'm happy to answer any questions and I'm
4 sure that the Relator and the government will want so speak.

5 THE COURT: Okay. Well, I just want to focus on
6 what's -- this is a status conference, but it's a status
7 conference not really on the matter that's pending before
8 the Court. The matter that's pending before the Court is a
9 motion for an order determining the value of the Relator's
10 collateral as of the sale; determining the amount of any
11 diminution in the amount allocable thereafter and directing
12 payments. And on that score, I gather that the parties not
13 only have exchanged their appraisals, where there seems to
14 be a spread between about \$17 million and \$22 million, at
15 least without going into any detail as to the valuation
16 issue. And I've had some discussions about resolving those
17 issues.

18 But the real subject of today's conference, at
19 least as highlighted by Mr. Fogelman's letter, is about
20 adequate protection. And there isn't really an adequate
21 protection motion in front of me. So, I'm reluctant to get
22 into great detail about whether the Relator is adequately
23 protected or not, because I don't really have a forum in
24 which to do that.

25 MR. FAIL: Thank you, Your Honor, that's fine.

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1 The Debtors would agree with that and further with respect
2 to the eight-month-old motion to determine the value. A lot
3 has happened since then, including the imposition of the
4 administrative expense program. I'll be providing an update
5 on that next, Your Honor. But the Debtors are focused on
6 reconciling claims that are entitled to be paid first, and
7 we've been efficient and, the Court has deferred and
8 adjourned all requests to have individual claims addressed
9 at the request of individual creditors. And so, I really
10 don't think that we need a status conference on that or that
11 the Court will be scheduling that portion.

12 THE COURT: Well, let me just -- part of the
13 Relator's collateral is cash. And the issue, I guess, that
14 Mr. Fogelman raises, is an adequate protection issue. But
15 to the extent that the Debtors would be paying out or using
16 cash, I don't think there's a cash collateral agreement.
17 There didn't need to be given the earlier findings of
18 adequate protection. But I suppose the issue could be
19 raised there. But I gather from what you've stated, that
20 the Debtors don't intend to be making distributions or
21 payments to administrative expense creditors going forward
22 without notice, which I'm assuming would include notice to
23 the Relator's counsel and the government. Am I right about
24 that?

25 MR. FAIL: You are, Your Honor. But I want to be

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1 clear, we will be providing notice. But I don't think that
2 -- you know, I hope to defer this issue beyond that notice
3 because the Court's confirmation order gave them a lien on
4 total assets, as I said. It says, "In addition to the sale
5 order grants, mortgagee shall have a replacement lien
6 against total assets as adequate protection. It shall be
7 subject to the carve out...," blah, blah, blah. So, it
8 basically has a lien on everything else and it was expected
9 that cash coming in would then go out. So, it's not new.
10 So, we do have cash now. We will announce -- it's not a
11 today issue.

12 THE COURT: I don't think it is a today issue, but
13 I also think that that finding of adequate protection is
14 subject to materially changed circumstances. So, it would
15 seem to me that if there are materially changed
16 circumstances that would, arguably, render the Relator and
17 the government not adequately protected upon the Debtors
18 making material cash distributions, then they should either
19 consent or -- you know, it should be on notice to them that
20 this is the proposed use with a showing which could be as
21 much as you want, including what you've just said, that they
22 are adequately protected. I think that would be, other than
23 a motion for relief from the stay or to enforce an
24 administrative expense under the applicable order, the
25 confirmation order. Those would be the two ways I think

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1 this issue could come up. And I don't think it's really
2 more than that can be said today about it, other than I
3 would encourage you to sit down with counsel for the
4 Relator, and to the extent Mr. Fogelman wants to be
5 involved, the government to potentially head off unnecessary
6 litigation over this issue so that they can report back to
7 their clients whether they think, based on what you've gone
8 through, that they are still adequately protected.

9 MR. FAIL: Thank you, Your Honor. We have had
10 conversations. We've attempted to cut off litigation costs.
11 The litigation remains outstanding as significant. The
12 Unsecured Creditors Committee is pursuing it. They're on
13 the line. I would hope that we don't see a motion and that
14 they don't request and that the Court doesn't require
15 additional costs for trials to prove what's already been
16 proven as law of the case; that the Debtor has significant
17 short-term assets, long-term assets, and that the long-term
18 assets are remaining with value that exceeds the estimated
19 \$20 million, even if all cash, you know, current cash, were
20 to go out, all current available cash were to go out
21 pursuant to the admin expense motion. I'm just afraid that,
22 you know, we're going to face another motion from the same
23 parties for the same issue. The Debtors were looking to cut
24 that off with the status conference.

25 THE COURT: All right.

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1 MR. HALPERIN: Your Honor, it's Alan Halperin.

2 THE COURT: Yeah, go ahead.

3 MR. HALPERIN: My apologies. I would like to be
4 heard on this if I may.

5 THE COURT: Sure.

6 MR. HALPERIN: First and foremost, just because it
7 bears saying at the beginning, I genuinely appreciate the
8 Court and the parties getting together today and allowing us
9 to be heard. These are some interesting and surreal times
10 that we're all living in right now, and I do hope that
11 everybody is okay. There are a couple of --

12 THE COURT: Could you -- I'm sorry -- just for the
13 record, could you just state who you're appearing on behalf
14 of?

15 MR. HALPERIN: My apologies, Your Honor. Alan
16 Halperin, Halperin Battaglia Benzija, on behalf of the
17 Relator, Carl Ireland.

18 THE COURT: Okay.

19 MR. HALPERIN: There are definitely a couple of
20 points that I felt was important to at least note, and I do
21 know that this is a status conference, it wasn't a motion.
22 But we've kind of, sort of blurred the line a little bit.

23 A couple of things: first, we filed our motion
24 back in August of 2019, seeking a determination of value of
25 the secured claim, and seeking adequate protection. It was

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1 noted in there, because we do continue to have concerns and
2 there were some things at the time that were concerning us.
3 And that was before confirmation. Actually, I think it
4 might have even been before the sale, but I'm not 100
5 percent sure, before the sale closing.

6 I don't need to get into everything. It's a
7 status conference and we've already gone through quite a
8 bit. But suffice it to say, I guess, in short, as part of
9 the sale order and as part of the confirmation order, the
10 right of the Relator and its co-mortgagee, the United
11 States, to come in and request a change in terms of the
12 adequate protection, in terms of requesting some monies to
13 be escrowed or paid, was reserved. And it was clear all
14 along that that was a preserved right.

15 So, I understand that lawyers will have positions,
16 and clients do too, but it's certainly not law of the case.
17 It was a procedure that was set up, and it can evolve, just
18 like the case can evolve. In terms of the --

19 THE COURT: Well, that's always the case with
20 adequate protection. So, I don't think we need to worry
21 about that. On the other hand, it's really not a good idea
22 to make a motion on, essentially, the same facts or not
23 materially change facts for your particular client. I don't
24 know the answer to that. Maybe you're at that point.

25 MR. HALPERIN: Clearly understood, Your Honor. By

1 way of going along those lines, let's be very clear, we made
2 or motion back in August of last year and it's been
3 adjourned from time to time at the request of the Debtor.
4 And, frankly, we did it because we wanted to queue up the
5 process and start to deal with our claim, but it wasn't
6 urgent, and we didn't --

7 THE COURT: Right, but I did deal with it in
8 confirmation, you know, because that was --

9 MR. HALPERIN: Absolutely.

10 THE COURT: -- it was teed up at confirmation.
11 So, we're really focusing on what's changed since the third
12 week of October last year. A lot may have changed as far as
13 your collateral. I don't know.

14 MR. HALPERIN: And that is correct, and that is
15 something that has been causing us concern. I don't need to
16 belabor the point per se, because this is a status
17 conference, Your Honor, but we do note in our reply some of
18 those changed circumstances. And they're material.
19 Everybody's operating on a little bit of a difficult basis
20 given the stay-at-home orders and the impact it's having on
21 everybody. But it does go to proceeds realized versus
22 proceeds that were projected.

23 THE COURT: Well, the issue, though, is whether
24 they're material as to your client's claim, not the case
25 generally.

1 MR. HALPERIN: We believe they are.

2 THE COURT: And I understand that you get that
3 too. So, I don't know if there's anything more to say at
4 this point. It's not really going to help me to hear more
5 on that without the right context. So, I would urge you,
6 again, to focus on that. It seems to be so far -- maybe I'm
7 wrong -- the discussions have been more about how to resolve
8 the claim as opposed to the interim step of adequate
9 protection. If you haven't had that latter set of
10 discussions, you should before making a motion. There are a
11 whole host of ways to assure a secured creditor that there
12 is adequate protection and/or a court. And I would just
13 want that exercise to have happened before any request for
14 adequate protection is teed up before me.

15 MR. HALPERIN: Your Honor, I think that's okay, I
16 guess, to the extent I heard what I thought I heard. I just
17 want to make sure we're on the same page. I thought I heard
18 Your Honor say that additional monies to any administrative
19 creditors wouldn't go out without notice. We have --

20 THE COURT: Well, material payments. I mean,
21 obviously, if they're paying the light bill, that's one
22 thing. But material payments, yeah.

23 MR. HALPERIN: But that would go, I would expect,
24 to the admin procedures motion, so, to the extent we're
25 talking about millions of dollars out the door. That said,

1 we have recently started discussions asking for additional
2 information, so that we could better understand the current
3 asset picture; some of which we were able to glean from the
4 public record, some of which really isn't in the public
5 record and we still don't have. And we will follow up with
6 the Debtors and their counsel, and hopefully be able to get
7 that information. And if not, if we need to tee this up by
8 another -- we still believe that we're in trouble and we
9 need to -- or concerned or at risk -- and need to tee this
10 up by another motion -- we can.

11 We kept it kind of light, although we did at least
12 address the requests in this motion, but we can tee it up
13 differently with more specifics if we need to. But we'd be
14 happy, and would prefer, to first be able to get the
15 information we need and come to some kind of an amicable
16 resolution of this. Because I think we and the Debtors, at
17 least via the positions in Court today, have a different
18 perspective on what was put before the Court in terms of
19 what could be, what should be relied on, and what
20 confirmation was based on versus what wasn't, in terms of
21 assets and what would be there.

22 All of that being said, as Your Honor stated --
23 and I agree with you -- it's better not to turn this into a
24 contested matter if we can all come to some kind of an
25 accord on issues that concern both sides. And I will

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1 continue to try to do that.

2 THE COURT: Okay. And that agreement can an
3 interim one just on adequate protection or it can be a
4 comprehensive one, which includes all the issues regarding
5 this claim that are before me. So, it can be either one.

6 And then as far as major outflows of cash are
7 concerned, if that cash is the Relator's cash collateral,
8 then I think that you all are entitled to notice before it
9 goes out the door.

10 MR. FAIL: That's fine. Your Honor, we've already
11 agreed. Your Honor, the Debtors already have agreed that
12 we're going to provide notice of a distribution. There's
13 nothing new or that's contemplated by a distribution. The
14 Court entered the confirmation order and directed us to give
15 out the cash that was liquidated from short-term assets to
16 administrative creditors, knowing that there were long-term
17 assets. And the long-term assets remain. The Committee
18 counsel is on the phone, who is prosecuting it. I mean, the
19 Relator wants detailed information and I just hope that they
20 don't continue to ask us to engage in another trial on
21 what's been done. The Court considered long-term and short-
22 term assets. We'll deal with it if they file something,
23 Judge.

24 THE COURT: Very well. Okay --

25 MR. HALPERIN: The only thing I would ask, which

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1 is where I was going with this -- I apologize, Judge, but I
2 want to make sure this is clear -- is that we'll get, what
3 I'll say is adequate notice so that if we do have a concern
4 about what's going out the door, we have an opportunity to
5 first talk with Weil and second, if we can't come to some
6 accord, that we have an opportunity to ask Your Honor for
7 some help. Judge, I want to make this very clear. I'm not
8 --

9 THE COURT: That's clear, you don't have to --
10 that's what I have in mind.

11 MR. FOGELMAN: Good morning, Your Honor, this is
12 Larry Fogelman, if I may be heard briefly?

13 THE COURT: Sure.

14 MR. FOGELMAN: Just for the record, I'm here on
15 behalf of the United States.

16 Your Honor, first, just as an initial matter, AUSA
17 Peter Aronoff is lead counsel for the government on this
18 case. He is recently returned from parental leave, and I've
19 been filling in, in his absence. So, I appreciate the
20 Court's hearing me this morning.

21 I think everything has already been said. I just
22 want to raise the concern that -- the Court's asked about
23 conversations about adequate protection. And at least to
24 date, and it's been said today in Court, the Debtor's
25 position has been that the Court's already ruled on this,

1 it's law of the case and nothing has changed.

2 We disagree with that, respectfully. I think,
3 just to give the Court one key example, at the time of the
4 confirmation hearing, it was estimated that Transform would
5 pay \$90 million of the administrative claims in this case.
6 And the recent settlement in January 2020 reduced that
7 amount of their contribution to \$7 million. So, right off
8 the bat, there's an \$83 million swing that has potentially
9 harmed the government and the Relator here.

10 We've been attempting to have conversations with
11 Debtors' counsel to evaluate how much cash is on hand,
12 what's the value of non-cash assets, what's the amount of
13 liability just to be able to compare that asset and
14 liability picture and have a more detailed -- get more
15 detailed information to present to the Court. And we'd
16 simply ask that the Debtors be flexible in providing that
17 information to us. There is still outstanding information
18 that we've attempted to learn that we have not yet been
19 given and we looked forward to working with Debtors in an
20 effort to resolve this.

21 THE COURT: Okay, very well.

22 MR. FOGELMAN: Thank you, Your Honor.

23 THE COURT: Why don't we move then to the next
24 agenda item; which I would like to actually have -- not the
25 next one. And I think, Mr. Fail, you alluded to it earlier,

1 which is just a brief status conference on the
2 administrative expense claim liquidation process.

3 MR. FAIL: Thank you, Your Honor. You're saying
4 you would like me to present that or you would not like me
5 to present that?

6 THE COURT: Yes. No, I would. I would like you
7 to.

8 MR. FAIL: Thank you.

9 THE COURT: It's not next on the agenda, but I
10 think it's related to this matter.

11 MR. FAIL: I do as well. I just wanted to
12 clarify. Thank you, Judge.

13 At the February 24th hearing, I presented an
14 updated on the Debtors' efforts to reconcile administrative
15 claims and administrative motions invalid. We disclosed at
16 the time that we had reconciled and allowed 359 opt invalid
17 for an allowed total of \$73.2 million that shared in \$21
18 million and received initial distribution of 28.7 percent
19 already.

20 We disclosed at that time that we had reconciled
21 992 non-opt-out settled admin claims as well. We disclosed
22 that we had resolved various claims without the need for
23 objections, that we had filed ten omnibus objections to more
24 than 1,400 claims; that we had resolved all but approximately
25 48 of those claims for less than 30 creditors with a

1 settlement or with a court order, but without a contested
2 hearing.

3 At that time, we had filed the Debtors' eleventh,
4 twelfth and thirteenth omnibus objections to another
5 approximately 280 claims that were pending at the time. At
6 that time there were approximately 668 other claims that
7 remained to be reconciled or put on an objection.

8 Since that last status update, Debtors have
9 continued to resolve claims through the administrative
10 claims process without objections. Since the last status
11 update, the objection deadlines for the eleventh, twelfth
12 and thirteenth omnibus objections have passed, and the Court
13 has already entered multiple orders granting the relief
14 requested.

15 The Debtors also filed their fourteenth,
16 fifteenth, sixteenth, seventeenth and eighteenth omnibus
17 objections. The Court entered an order for the fourteenth
18 omnibus objection already. The objection deadline remains
19 outstanding for the remaining. We're going forward to
20 address the remaining claims on the Debtor's second omnibus
21 objection later today.

22 While we have adjourned disputes from time to
23 time, the Debtors have been efficient and productive in the
24 interim. Out of all of the hundreds of claims subject to
25 the first 13 omnibus objections, there are only a very few

1 claims for which the hearings remain adjourned. The numbers
2 are quite impressive. A total of only six non-World Import
3 claims remain adjourned. And a total of only 11 World
4 Import-related claims remain adjourned.

5 I'll note two things of further relevance with
6 respect to the already incredibly small population of
7 claims. First, the Debtors have reached a settlement in
8 principle, and are documenting settlements with three of
9 those 11 World Imports-related claims. So, a more accurate
10 count of those claims is really 25 percent lower than the
11 11.

12 Second, certain of the remaining World Imports
13 creditors have opted out of the administrative claims
14 settlement. In other words, they will not participate in
15 distributions ahead of the plan effective date, even if
16 their claims are eventually allowed through litigation in
17 advance of the effective date. Notably, these include some
18 of the most vocal objectors. And of course, the Debtors
19 were required to prioritize settlements of all other claims
20 ahead of their claim.

21 In summary and in total, since the last update,
22 the Debtors have reduced the number of claims that have not
23 been settled or subject to an objection, from 668 to 127; a
24 reduction of 541 or 80 percent of the claims population.
25 Obviously, a lot of work went into this. The results speak

1 for themselves.

2 The Debtors have been efficient with their use of
3 judicial resources and we hope to continue that efficiency
4 while continuing to make progress. We ask that the Court
5 allow us to be able to continue in this fashion. While we
6 have made significant progress, there remains significant
7 work to do. The goal of the Debtors continues to be to
8 reduce the number and amount of disputed claims in advance
9 of the next distribution, in order to reduce the need for
10 reserves, and to maximize the amount that is distributable.

11 The Debtors and the UCC advisors, and now the
12 administrative claims representative, have the best
13 visibility into the pools of claims, and the best way to
14 meet that goal. Individual creditors do not. They only see
15 and argue for their particular claim. In addition, as we
16 have disclosed before, while the Debtors have reconciled the
17 amounts that they owe, they have also sent demand letters
18 and commenced hundreds of preference actions.

19 There is overlap between the claimants and the
20 preference defendants, including significant overlap amongst
21 a small group of remaining disputed World Import creditors.
22 The Debtors do not intend to make any distribution to these
23 prepetition claims while preference exposure is outstanding.

24 The Debtors have consulted with the UCC and the
25 administrative claims representative in developing and

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1 executing their strategies. Both the UCC and the
2 administrative claims representative supported the debtors'
3 decision to continue to adjourn the hearings that have been
4 adjourned, and to reduce the time and expense of litigation
5 on the World Import issues.

6 Judge, I'm happy to answer any questions you have,
7 but that's our update on the significant progress that's
8 been made with respect to the program.

9 THE COURT: Okay. The one question I have at this
10 point is, what is going on with regard to payment of these
11 claims to the extent allowed?

12 MR. FAIL: Judge, under the program the debtors
13 are required to fund certain reserves and excess available
14 cash above those reserves are to be distributed to the next
15 round of these creditors that I'm talking about, that have
16 been allowed since the initial distribution, pro rata, up to
17 the 28 percent recovery that initial distribution received,
18 but that's after we provide notice.

19 THE COURT: Okay.

20 MR. FAIL: The significant 80 percent reduction in
21 number has led to a significant reduction in what would
22 otherwise need to be reserved for the claims. But our goal
23 will be, and must be, because the confirmation order
24 requires us, to expeditiously move to distribute the cash
25 that we have amassed, and anything that comes in, to those

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1 creditors.

2 THE COURT: So, who does that notice go to?

3 MR. FAIL: We'll file it publicly on the docket.

4 I suggest that nothing further need to be required. Parties
5 that are interested receive information from the docket.

6 And there wasn't -- we don't need to continue to do mailings
7 or anything like that. We'll file notice on the docket.

8 People can --

9 THE COURT: At this point, you have claims that
10 have been filed, right? There's no one out there who hasn't
11 filed a claim? I mean, that didn't have to file a claim?

12 MR. FAIL: Judge, to be clear, we're talking about
13 administrative priority claims. We looked at those that
14 were filed by the bar date. We filed motions based on
15 everything in our books and records. We sent out notices
16 asking anybody in connection with the ballots. I think at
17 the last hearing I talked about the -- I forgot if it was
18 between 10- and 20,000 parties that we noticed. We think
19 we've covered the universe, and now we've gone through
20 everything that's come through.

21 THE COURT: I mean, at this point, you have
22 defined the universe because of the bar date. So --

23 MR. FAIL: For pre-petition claims, that's right.
24 And honestly, we haven't operated as Debtor -- we haven't
25 operated a business in close to a year, so, we're over a

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1 year. We think we know of everybody that's out there.

2 THE COURT: Okay. I see at least Mr. Wander on
3 the Dashboard. I don't know if other parties -- he had
4 asked for this conference. I don't know if other parties
5 want to be heard as well.

6 MR. WANDER: Good morning, Judge, this is David
7 Wander, of Davidoff Hutcher & Citron, on behalf of Orient
8 Craft Limited and HK Sino-Thai, that's S-I-N-O hyphen T-H-A-
9 I, Trading Company Limited. After I give you my comments,
10 Your Honor, Benjamin Butterfield of the Morrison Foster
11 firm, counsel for Icon, would like to give his comments, if
12 that is okay with Your Honor.

13 THE COURT: Okay.

14 MR. WANDER: Your Honor, I want to focus on the
15 matter that I asked you to have this status conference.
16 There were additional matters that were just mentioned with
17 regard to the payment of a second distribution. And while I
18 have comments on that, I am not going to say it on this
19 call, because that was not the purpose of my request, Your
20 Honor. I would only note that there has been no
21 administrative claims bar date in the case. But I want to
22 focus on my matter, Your Honor.

23 THE COURT: But I'm sorry, just on that point, it
24 is the case that it's highly unlikely that there are any
25 parties who care about administrative expenses at this

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1 point, that have not surfaced, given that the Debtors' sale
2 happened so long ago.

3 MR. WANDER: Your Honor, I don't think that's
4 correct, because I saw on the docket in the past two days, I
5 believe, an administrative claim of \$1 million that was
6 recently filed. And I've been following the docket and each
7 week I see additional motions for allowance of
8 administrative claim. So, I believe there are other
9 administrative claims out there, but again, that is not what
10 I asked to be heard on today.

11 THE COURT: Okay, all right.

12 MR. WANDER: Your Honor, I look at this very
13 differently than the Debtors' position. From my viewpoint,
14 if the Court rendered or renders a decision on the World
15 Imports issue, it would save a lot of legal fees. Claimants
16 want to know the position in the Southern District on
17 503(b)(9). It's a pressing issue. I imagine, based on --

18 THE COURT: I'm sorry, in this case?

19 MR. WANDER: No.

20 THE COURT: It doesn't sound like the numbers bear
21 that out.

22 MR. WANDER: Well, Your Honor, I've had many
23 discussions with other administrative claimants, and many of
24 them, frankly, have been worn down and they can't, some of
25 them, their clients can't continue to pay the legal fees.

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1 Others are being told there's another distribution coming
2 and if you don't settle, you're going to miss the boat. So,
3 I just look at things differently from the Debtors' point of
4 view, because I've been vocal in my viewpoints on the
5 administrative claims process, and certain defects, but I
6 haven't put it before Your Honor because it hasn't been
7 appropriate for my clients.

8 There are no negotiation going on right now on my
9 client's 503(b)(9) claims. And I believe that it's
10 important for my clients. It's important for the bankruptcy
11 bar, particularly with the deluge of retail bankruptcy
12 filings that we're expecting. Now, I wrote to Your Honor --

13 THE COURT: No, but Mr. Wander, that's not this
14 case. People write law review articles and that's why
15 people like you advise their clients. But courts just don't
16 go out and write opinions because they want to write an
17 opinion that will affect the law in other cases. So, to me,
18 that's not warranted. Can go back, though, to one of your
19 other points? I just want to make sure I understand a
20 couple of things here.

21 First, is your client a defendant or has it been
22 given notice that it could be a defendant in a preference
23 action?

24 MR. WANDER: Orient Craft I'm not aware of any
25 preference claim. I believe for HK Sino-Thai, I think my

1 client got a letter four months ago and nothing else has
2 happened. We did not opt out, so we're in the
3 administrative claims program. So, if that answers Your
4 Honor's questions?

5 THE COURT: Okay. And then the other question I
6 had is, I appreciate that the World Imports issue would, at
7 some level, affect negotiations. But it appears to me that
8 in this case, there are many other factors that probably
9 have a more significant effect on negotiation. Those
10 include potential preference liability and, most
11 importantly, simply the Debtors' ability to pay. And I
12 don't get the impression, but you can feel free to correct
13 me, that the thing that is driving all of these settlements
14 is the World Imports issue and parties trying to figure out
15 whether it applies or not, and/or whether they have given up
16 on it because they don't have the money to spend.

17 Normally, if people need an answer on something
18 like that, and want an answer as opposed to want the
19 uncertainty in an negotiation, which could help both sides,
20 they leave it open, or they, you know, if they need an
21 answer they go and get one. But to say that people don't
22 want to spend the money on it, may well mean, simply, they
23 don't want to spend anymore money on the case because they
24 see their best-case scenario even if they win, being a
25 certain percentage recovery as opposed to a full recovery.

1 MR. WANDER: I appreciate that, Your Honor. The
2 way I look at this right now, from a procedural posture, I
3 wrote to Your Honor on this issue in January, on January 21.
4 And at that time, I said I will not object to one more
5 adjournment of the hearing on the tenth omnibus claims
6 motion if the Debtors would file their reply papers. And
7 Your Honor forced the Debtor to file their reply papers, I
8 believe, in January. And so, we had agreed that the matter
9 would get adjourned. And I did say in my email at the end,
10 "This issue is too important for the can to just be kicked
11 further down the road."

12 Now, that was in January, and here we are in
13 April. And myself and others were prepared for oral
14 argument today, and then we heard that the Debtor was going
15 to adjourn things. And I'm okay with that, Your Honor.
16 Because of what's going on right now, I'm not going to rant
17 and rave like I might otherwise have done.

18 But there's no reason, Your Honor, respectfully,
19 that this matter can't and shouldn't be addressed at the
20 next omnibus on May 14. Your Honor, I believe, I submit,
21 Your Honor is going to have to render a decision on this,
22 because there are certain parties that do not feel that the
23 type of settlement that's been proposed comes close to what
24 would be acceptable to my clients. So, we would --

25 THE COURT: How many of those parties are there at

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1 this point? That was one of the reasons to adjourn back in
2 January. If it wasn't clear who was going to be involved in
3 the dispute --

4 MR. WANDER: I think there was --

5 THE COURT: Has that been narrowed down? There
6 are three parties.

7 MR. WANDER: I think it's -- well, three law
8 firms. So, Your Honor, I have two clients; Mr. Butterfield,
9 he has Icon, which is, I think the largest one, it's about a
10 \$10 million claim, I believe. And then there's Jeffrey
11 Schwartz, who has the Winners. So, we want to go forward --

12 MS. MAZUR KRAEMER: Your Honor, if I may, this is
13 Salene Mazur Kraemer on behalf of Vir Ventures and AMI
14 Ventures. We are in this boat as well. They had a claim
15 for about \$800,000, Your Honor. It's a World Imports issue
16 also. And I represent another creditor, New Acme, their
17 claim is about \$100,000. Again, it's a World Imports issue.
18 I echo the sentiments of counsel regarding this issue.

19 THE COURT: Have you briefed it like the other
20 three firms?

21 MS. MAZUR KRAEMER: Yes, I have, Your Honor. It's
22 a joint response to the second omnibus objection.

23 MR. FAIL: Judge, it's Garrett Fail, just a quick
24 check of reality here. Since January, we've resolved a
25 large number of the ones that were remaining, as we said we

1 were going to. Since January, Your Honor gave us the
2 discretion to continue to adjourn it where we thought it
3 would be productive for the Debtors. Not necessarily -- not
4 productive for the parties that have insisted that it goes
5 forward.

6 We checked with the Creditors Committee, we've
7 checked with the administrative claims representative, who
8 have agreed with us and whose counsels are on the line
9 today. We've demonstrated that there has been progress with
10 respect to this subgroup of claimants.

11 We've further demonstrated that we've not focused
12 solely on these creditors, but to address 80 percent of the
13 other creditors that are out there.

14 THE COURT: Mr. Fail, I heard you earlier.

15 MR. FAIL: Okay, and then the last --

16 THE COURT: I'm just trying to figure out how many
17 people are involved here --

18 MR. FAIL: Very few.

19 THE COURT: -- it sounds like there are like eight
20 or ten.

21 MR. FAIL: There's eight of them at most. Our
22 records indicate, and we're checking, that -- and now I've
23 just gotten confirmation -- Orient Craft, Mr. Wander's
24 client, opted out. The administrative claim motions that
25 are being filed recently are related to real estate and

1 landlord claims where Transform is liable. So, I don't
2 think there's anything wrong with any of the statements,
3 actually, that I made. The new motions don't demonstrate
4 that there's people that have valid claims against us and I
5 don't think it's relevant at all to whether or not we
6 continue to adjourn. At most, there's more work for us to
7 do -- nothing that helps Mr. Wander's client.

8 THE COURT: So, I guess the one other point --

9 MR. WANDER: Your Honor, if I may --

10 THE COURT: No, no, let me just ask this question
11 first. I wanted the Debtors to file their brief so that --

12 MR. FAIL: We did.

13 THE COURT: -- the lawyers involved here -- I
14 know, I know, and I wanted the lawyers involved here to
15 actually see both sides of the question, and their clients
16 could see both sides of the question and could analyze it in
17 the context of settlement negotiation.

18 Mr. Wander is right, there is a time, at some
19 point, when settlement negotiations stop because one side or
20 the other doesn't want to continue. But at the same time,
21 if, in the meantime, people are not being prejudiced, and
22 the Debtors are actually using their time more efficiently,
23 I'm not sure why we should put this issue on the front
24 burner.

25 So, I guess the thing I'm most interested in at

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1 this point is how, if at all, other than wanting to have an
2 answer conclusively, which could hurt or help, there's
3 prejudice of this being adjourned -- not only today, which
4 it was, but say, from the May hearing, if the Debtors are at
5 a point there where, in consultation with various parties,
6 they think it should be adjourned. We're at the prejudice,
7 that's really the issue I'm asking Mr. Wander.

8 MR. WANDER: Yes, Your Honor, if I may defer just
9 now to counsel, Mr. Butterfield. I know he wanted to
10 address you.

11 THE COURT: Okay.

12 MR. WANDER: And if he doesn't address this point,
13 which I think he will, then I will do that after he speaks.

14 THE COURT: Okay.

15 MR. BUTTERFIELD: Good morning, Your Honor. For
16 the record, it's Ben Butterfield from Morrison & Foerster
17 for Icon Health and Fitness. Your Honor, I just wanted to
18 address that point and also add a little bit to the comments
19 from Mr. Wander.

20 We understand that adjournments can be helpful,
21 that they can facilitate settlements, and we support that.
22 But what we don't think should be allowed is for a Debtor to
23 use adjournments defensively, right, defensively to pressure
24 creditors to settle.

25 And look, you know, I know that some creditors

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1 will complain about any delay, any adjournment. And we
2 tried not to complain in this case. But I think the Debtors
3 are starting to cross the line here. They filed their tenth
4 omnibus objection last September. They filed their eleventh
5 several months ago now. The issue is fully briefed.
6 They've already filed a reply for the tenth; maybe they'll
7 file a reply for the eleventh, I don't know. But otherwise,
8 it's fully briefed.

9 This is a discreet legal issue. Like they said,
10 there's not that many admin creditors out there with this
11 issue that remain at this point; there's just a few of us.
12 And you know, the Debtors have given us a preliminary
13 settlement range and we are nowhere close. We are nowhere
14 close. And the Debtors don't disagree.

15 We gave them our estimate of it, they gave us
16 theirs and they said, look, I don't even think we can have a
17 settlement here. We've never seen a settlement where the
18 divide is so great. So, we think we have very strong
19 arguments. There are dozens of cases on our side. There's
20 not a single case on the Debtors' side that's going to win
21 on the merits --

22 THE COURT: Can I interrupt you?

23 MR. BUTTERFIELD: Yes, Your Honor, please.

24 THE COURT: Are your clients preference targets?

25 MR. BUTTERFIELD: They are. So, we have an \$8.5

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1 million disputed 503(b)(9) World Imports claim. That's like
2 the disputed portion on World Imports. Our preference
3 liability, you know, we've talked to the Debtors about it.
4 We think it's about \$3 million. And one of the concerns
5 here is that, like we have a reserve issue. Like, we're not
6 sure -- I know that people are talking about there's going
7 to be a reserve, there's going to be a reserve, but where is
8 that in the confirmation order?

9 MR. FAIL: This is not on for the agenda today.
10 What is this relevant for? This is ---

11 THE COURT: I'm just focusing on -- and this goes
12 to the prejudice point -- again, the Debtors have
13 represented that they're giving notice, and they've
14 discussed reserves. I understand that the Debtors' decision
15 to adjourn today's hearing, which had been noticed on the
16 World Imports issue, came late. What I want to focus on is
17 that I want to make sure that if they do the same thing -- I
18 forget when the next omnibus day is. It's May ...

19 MR. BUTTERFIELD: May 14, Your Honor.

20 THE COURT: May 14, well, that's not that far
21 away. But if they do it before then, on, say, May 13, that
22 it's the right thing to do. And to me, I'm not sure it
23 really matters unless there's real prejudice in terms of
24 money going out the door that would otherwise be spread
25 among parties. And I'm not hearing that yet.

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1 MR. WANDER: Judge, this is David Wander. I'd
2 like to address the prejudice.

3 THE COURT: Okay.

4 MR. WANDER: The prejudice is to everyone because,
5 let's assume Your Honor rules against my client, then maybe
6 there shouldn't be a reserve, and there will be more money
7 to distribute. Now, say Your Honor rules for my client,
8 then those funds aren't going to (indiscernible), they're
9 going to be distributed.

10 MR. FAIL: No, they won't, in either case. That's
11 not true, right? We will not distribute after the final
12 order, number one and number two -- is Mr. Wander now giving
13 up his appellate rights if he loses? That would be great if
14 he is. But it doesn't seem to be the history of the case
15 that he has. So, I just -- these arguments fall flat.

16 MR. WANDER: Please don't interrupt me, because I
17 wasn't finished. In addition, I'll address what Mr. Fail
18 brought up. And this is another reason that goes to the
19 prejudice. If Your Honor rules against my client and
20 others, we will appeal. We may do a direct appeal to the
21 Second Circuit, whatever procedure is appropriate. And this
22 is an issue that then will still have to be resolved with
23 millions of dollars in reserve if Your Honor rules for my
24 clients, and supports the World Imports decision. It's
25 doubtful there would be an appeal. And I'm just saying

1 that. I'm sure Mr. Fail will disagree, but as a practical
2 matter, a decision by Your Honor, together with the Third
3 Circuit, I think the Debtor would probably determine they
4 would then be wasting a state's resources. So, there's the
5 prejudice, Your Honor.

6 To my other client, Pearl Global, that wants to
7 have more money distributed, it doesn't want to have a
8 reserve. And to the other claimant, they don't want to have
9 a reserve. That's the prejudice, Your Honor.

10 MR. FAIL: Judge, one more time, now that Mr.
11 Wander is finished, I'm looking at the Orient Craft ballot.
12 They're both opt out. So, there's no reserve whatsoever for
13 his clients' claims that will clog up anything and there's
14 no prejudice for his clients because they're not receiving
15 anything until the effective date of the plan. So that's
16 that.

17 MR. BUTTERFIELD: Your Honor, Ben Butterfield from
18 Morrison & Foerster. Mr. Fail, are you representing that --
19 so, our client, Icon, opted in. And our claim is -- the
20 disputed portion of our claim is \$8.5 million and the full
21 amount is close to \$10. Are you representing that you will
22 be reserving for our client's claim, even though our client
23 is the subject of a preference demand, or a preference
24 complaint?

25 MR. FAIL: I'm not making any representations

1 because it's not on the agenda, and we haven't announced the
2 distribution. So, the relevant parties haven't said
3 anything. But disputed claims are acknowledged, they're
4 before the Court. We'll address them.

5 There's no prejudice whatsoever. We deal with the
6 Icon, and I haven't figured -- we haven't addressed the
7 preference setoff and we can and we will. But you're
8 subject to a preference, so you won't receive a distribution
9 on a prepetition claim. That may be litigable issue, but
10 it's another one that could be tied up for some time, that
11 doesn't result in a distribution going out the door.

12 MR. BUTTERFIELD: Your Honor, Ben Butterfield from
13 MoFo. So, look, I really think there's two issues here.
14 So, the first is, we're going to get jammed. You know, we
15 filed our papers, we've been paying attention to the docket.
16 But what's going to happen is there's going to be a notice
17 of distribution and then we're going to get jammed because
18 our claim is not allowed yet. But they're not going to
19 reserve for it. They're not going to reserve for it. And
20 the second thing is, every time --

21 MR. FAIL: Not true.

22 MR. BUTTERFIELD: -- we have these hearings, they
23 get put on the agenda and then they get adjourned two days
24 before the hearing. And we spend time, we spend or clients'
25 money, we spend resources, we get distracted from our

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1 settlement negotiations, because we're trying to prepare for
2 a hearing and then it just disappears. So, the start-stop
3 nature of this has become really burdensome.

4 MR. FAIL: We'd love to kick it off indefinitely,
5 but what we've done is follow the Court's orders and waited
6 'til we see if it was still necessary and productive. And
7 as we've settled with 25 percent of the remaining ones that
8 are relevant, and we're working to document it, we, the
9 Creditors Committee and the administrative claims
10 representative thought, in this circumstance, it did make
11 sense.

12 THE COURT: Okay, I think -- you should adjourn
13 this to the June omnibus day and you should provide notice
14 if you intend to further adjourn it at least two weeks
15 before that date, and we'll have a discussion then as to
16 whether I'll grant that adjournment or not.

17 MR. FAIL: Thank you, Your Honor.

18 MS. MAZUR KRAEMER: Your Honor, if I may --

19 THE COURT: They are very capable, counsel, here.
20 You've just highlighted about ten reasons why my ruling is
21 not going to be the driving factor in resolving these
22 claims, and you all know it, so you should deal with that.
23 If you don't, that's fine, I will decide it. But it
24 shouldn't be driving the bus.

25 MR. HALPERIN: Your Honor, it's Alan Halperin, if

1 I could ask one thing just relating back to the very
2 beginning of this topic. Mr. Fail indicated that in terms
3 of notice on distributions, it was going to be ECF, as we
4 have been sort of dubbed as someone a little bit more
5 elevated in terms of priority and I don't want to see this
6 get lost in the mail, so to speak. If we could get direct
7 notice email to our folks, I would be grateful.

8 THE COURT: That's fine, as long as only one
9 attorney checks the ECF. Yes, I will note there were three
10 people on this call, so, that's fine. But you can take off
11 the number of people that are checking the ECF.

12 MS. MAZUR KRAEMER: Your Honor, if I may. Selene
13 Mazur Kraemer with Vir Ventures and AMI Ventures. Just for
14 the purposes of the record, I did file a motion back in
15 February, in ECF 7331, for the other e-marketplace seller
16 counsel that are on the phone here, that did set forth all
17 of the things that they just said about a need to set aside
18 a reserve. My client's claim was \$885,000. So, I just
19 wanted to note that for the record.

20 You did ask me to withdraw that motion, Your
21 Honor, which we did. But again, the prejudice to my client
22 is they basically have run out of money to pay my counsel
23 fee and I think that's the same with all these other e-
24 marketplace sellers who have smaller claims, they've just
25 kind of given up because this issue has gone on for so long

1 and so many months.

2 MR. FAIL: Your Honor, if we're ready to move onto
3 the next item, I think the only thing to say with respect to
4 that last comment is I don't think that Ms. Kraemer's
5 clients have a World Imports issue. I think they are the
6 marketplace issue, which is coming up right now; we believe
7 totally unrelated, but Your Honor will make that decision.

8 THE COURT: Okay.

9 MR. FAIL: The fourth item on the agenda is the
10 Debtors' second omnibus objection to proofs of claim. The
11 Debtors filed this objection with respect to a number of
12 claims that were asserted as entitled to priority. There
13 are six claimants that are contesting the objection, and
14 that we're moving forward with today. Each assets claim
15 entitled to 503(b)(9) priority.

16 As we said in our objection, the Debtors did not
17 receive goods, which is a prima facie element to entitlement
18 to 503(b)(9). Each of these parties, as set forth in our
19 response, which is filed on our reply at 7829, so I won't
20 belabor it, Your Honor. Each of these parties sold goods to
21 non-debtors. They marketed their goods through a Sears
22 marketplace website.

23 We're not contesting in this objection that Sears
24 may have owed them money as pass-through, but these aren't
25 even drop-ship cases. These parties sold goods to other

1 people. The Debtors never purchased them like a drop ship
2 case where the Debtors buy goods and they're delivered
3 someplace else.

4 This is, as we cited in our reply, a step removed
5 from that. The Debtors aren't these vendors' customers.
6 The Debtors didn't buy any goods from the vendors. The
7 Debtors didn't receive any goods from these Debtors. And
8 so, it's not a matter of does Sears owe these people money,
9 it's, are they entitled to priority.

10 We think the law is clear, priorities have to be
11 awarded strictly and narrowly. And there's nothing in the
12 claim or the responses to the objection that entitled them
13 to priority. There are other bases for entitlement to money
14 asserted in the replies.

15 At most, they're duplicative tort claims, which
16 would be duplicative to get money damages. Those are
17 unsecured claim issues. None of the allegations in the
18 responses elevate general unsecured claims to priority.
19 There's no overlap with World Imports, there's no overlap
20 with anything substantive with respect to 503(b)(9)
21 disputes. This is plain, clear cut. We didn't buy
22 anything. We didn't get anything. Full stop. Happy to
23 answer any questions or address any responses.

24 THE COURT: Okay. I'm happy to hear from the
25 objectors now.

1 MS. MAZUR KRAEMER: I'm sorry, Your Honor, did you
2 give us the floor there?

3 THE COURT: Yes.

4 MS. MAZUR KRAEMER: Okay, thank you.

5 THE COURT: Each of the objectors should feel free
6 to...

7 MS. MAZUR KRAEMER: Your Honor, we set forth our
8 response --

9 THE COURT: I think I know who you are, but you
10 should just state it again for the record so we could be
11 absolutely sure.

12 MS. MAZUR KRAEMER: Selene Mazur Kraemer on behalf
13 of Vir Ventures and AMI Ventures. We pleaded, we briefed
14 this in our response that we filed back in, I think,
15 September. We believe that -- and I apologize for the --
16 when they say World Imports issue -- we rely on World
17 Imports in our response, Your Honor, arguing that there was
18 constructive possession on behalf of the Debtor.

19 Our client is, again, an e-marketplace seller.
20 The customer buys, let's say, a treadmill online through the
21 Sears portal. And my client fulfills that order. Sears
22 tells us what to buy, Sears tells us where to ship it, and
23 we ship it. We get paid only after we provide a proof of
24 delivery to Sears customers to Sears. And we did all those
25 things, Your Honor, to the tune of \$885,000 of goods that

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1 Sears then did not transfer to us, the customer funds which,
2 according to the agreement as we set forth in our papers,
3 was to be held as an agent for the purposes of returning
4 those customer funds, minus Sears' commission.

5 Your Honor, we would argue that, again,
6 constructive possession as a result of delivery to one of
7 the buyers of Sears agents, which would have been UPS or
8 FedEx, which was a shipper, Your Honor, or directly to Sears
9 customers. That's our position, Your Honor, and I know with
10 respect to the definition of control -- I'm sorry, the
11 definition of constructive possession, relates to the amount
12 of control that Sears would have had in that kind of a
13 transaction. And as we've set forth in our papers, that
14 sufficient control would have existed here and that,
15 therefore, my client should be allowed an administrative
16 claim for these 503(b)(9) claims. That's it, Your Honor.
17 The rest of it we rest on it with our papers.

18 MR. FLAHAUT: Your Honor, this is Doug Flahaut
19 from Arent Fox LLP on behalf of Sky Billiards. I don't know
20 if the Court, sort of, wants to go down and take each of the
21 individual claims in order or whether now is the appropriate
22 time for me to weigh in on behalf of my client, Sky
23 Billiards.

24 THE COURT: No, go ahead. That's fine.

25 MR. FLAHAUT: Thank you, Your Honor. Again, Doug

1 Flahaut from Arent Fox LLP on behalf of Sky Billiards.

2 Sky Billiards' claim here, and argument is
3 particularly unique, and I believe is different from the
4 other arguments made at this hearing. I would note that
5 this second omnibus objection was filed in August of 2019
6 and has been continued unilaterally by the Debtor about
7 seven months, a number of times. It is only now, during a
8 global pandemic when we can't get into the courthouse
9 physically that the debtor now decides to go forward with
10 this objection. But, in any case, we are prepared to make
11 our arguments and proceed.

12 The first thing I want to put on the record and
13 raise before Your Honor is the fact that I don't see any
14 evidence in the record before Your Honor that Sears didn't
15 receive these goods. If you look at the second omnibus
16 objection, you don't see any declaration in support of --

17 THE COURT: Where is there evidence that you
18 delivered them?

19 MR. FLAHAUT: Well, I'll get to that, Your Honor,
20 and I think it is in the record of that. What there's
21 evidence of is we filed a proof of claim, which is prima
22 facie validity in amount of our claim, and in response to
23 the objection, we attached an email from a Sears account
24 executive stating that Sears received the goods and that we
25 should check the 503(b)(9) box. And that moves to my

1 estoppel argument, Your Honor, in the sense that we believe
2 that potentially it's a live issue as to whether Sears
3 received the goods or not. I think you heard counsel before
4 me argue about that and there are going to be some disputes
5 about that. I understand there has been, in the past, a lot
6 of disputes on the facts on these sorts of things as to what
7 constitutes receipt and what doesn't and that will be
8 litigated in due course, if need be.

9 But right now, you don't have any evidence in the
10 record that says Sears didn't receive the goods and I think
11 Sears bears the burden on objecting to our claim of
12 overcoming the prima facie evidence of the claim. And so, I
13 just wanted to call into question the lack of evidence in
14 the Objection itself.

15 I believe we're here on what's known as, pursuant
16 to the objection proceedings, as a sufficiency hearing. So,
17 we're looking to see whether there's enough evidence, it's
18 the same standard as a motion to dismiss for failure to
19 state a claim. So, if my client has any plausible claim,
20 then this Objection needs to be overruled at this stage.
21 And I think -- what's that?

22 THE COURT: Go ahead, I'm sorry.

23 MR. FLAHAUT: Okay. Well, I want to address the
24 Court's concerns, obviously. Those are the most important
25 concerns, so if you have a particular question, I do want to

1 address that.

2 THE COURT: I'm trying to pull up your pleading to
3 look at the exhibit.

4 MR. FLAHAUT: Sure.

5 THE COURT: The client, again, is?

6 MR. FLAHAUT: My client is Sky Billiards.

7 MR. FAIL: It's Document 5421, Judge.

8 MR. FLAHAUT: Yes, it's ECF Document 5421 and
9 this, again, was filed -- I apologize to the Court on the
10 shortness of these opposition papers, but we were trying to
11 resolve this consensually up until, sort of, the day before
12 it was due and then no further extension of the deadline was
13 granted. So, we rushed to file at least a written
14 opposition.

15 MR. FAIL: Judge, it's Garrett Fail from Weil
16 Gotshal for the Debtors. 5421-1 is the exhibit that counsel
17 seems to be referring to. It doesn't say what counsel
18 suggests. This is a generic email that says -- it doesn't
19 say that the Debtors received goods. It says, claims for
20 amount -- it's an instruction on how to file the form
21 electronically.

22 THE COURT: This is from --

23 MR. FLAHAUT: If I may, Mr. Fail, I haven't
24 completed my argument.

25 THE COURT: No, I'm just trying to locate it.

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1 This is from Shawn Zavsza, is that the email we're referring
2 to?

3 MR. FAIL: That's what I'm (indiscernible), Your
4 Honor.

5 THE COURT: Okay. All right. You can go ahead, I
6 just was trying --

7 MR. FLAHAUT: Sure, and I'm sure Mr. Fail will
8 have an opportunity to state his position, but I'd like to
9 finish stating mine.

10 The email -- I think you've got it up now, this is
11 from Shawn Zavsza, the account executive. And he
12 understands the relationship between the parties well and
13 this is post-petition, so this is after the filing of the
14 petition. And so, he sends an email to my client, including
15 instructions for filing a claim and also says there that you
16 want to use "yes" for question 13 and include that as well.

17 Now, if you look at question 13 on the proof of
18 claim form, it spells out specifically. It says, this is
19 the amount of goods received by the Debtor within 20 days of
20 the Petition. So, I believe that Mr. Zavsza here is telling
21 my client, or acknowledging to my client, that he has
22 received these goods. Now, he may be, in hindsight,
23 incorrect, whether there's going to be litigation about
24 this. But --

25 THE COURT: But do you have -- I'm sorry -- do you

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1 have any evidence that they were actually -- the issue here
2 is whether they were physically delivered to Sears or Bailey
3 or agent for Sears. Do you have any evidence of that?

4 MR. FLAHAUT: I do not on the record, Your Honor,
5 and I don't know if I do outside of the record.

6 THE COURT: Okay. So, it appears to me that the
7 argument you're making, based on this email, is simply that
8 an employee of Sears acknowledged that you had a claim for
9 goods delivered. Not that they actually were delivered,
10 right? So it's more of an estoppel argument or a waiver or
11 a contract argument than a proof that they were actually
12 delivered.

13 MR. FLAHAUT: It is certainly an estoppel
14 argument, Your Honor. I think the initial point I was
15 making at the beginning about the lack of evidence in
16 opposition was just highlighting -- and I don't -- I'm
17 admitted pro hac vice here, so I don't practice in front of
18 your Court, Your Honor, very often. But I was somewhat
19 surprised that the objection of this magnitude did not have
20 any evidence, any declaration, anybody from Sears saying, I
21 never received the goods, for example, which would
22 presumably be necessary to overcome the prima facie validity
23 and amount of my client's claim. But yes, Your Honor --

24 THE COURT: Each one says they have not been
25 received. I'm looking at the omnibus objection now.

1 MR. FLAHAUT: Yes. They say it in the pleading,
2 Your Honor. The lawyers say it, but I don't see a
3 declaration from anybody that would put that into evidence
4 and perhaps that's an offer of proof that's sufficient to
5 Your Honor. But yes, the crux of my client's argument -- I
6 think the strongest argument for my client, and what makes
7 my client unique and different from the other parties in
8 this same boat here, is the estoppel argument.

9 Your Honor hit it on the head, I think that we
10 relied -- my client relied on the account executive stating
11 that they did receive the goods. Whether they did or not,
12 we relied on that and on the prospect that we would be paid
13 a priority on that claim and in reliance, what we didn't do
14 is, we didn't aggressively pursue, perhaps, constructive
15 trust arguments, other arguments that can be made in these
16 sorts of situations, chasing the money or aggressively
17 pursue the kind of critical vendor preferential treatment
18 that sometimes you can get in these sorts of situations.
19 Because my client was lulled, I suppose, into believing that
20 he would be -- have a valid 503(b)(9) claim. And it's only
21 now, way after the fact, that the Debtor, the same entity
22 that essentially, in my view, acknowledged receipt of these
23 goods for purposes of 503(b)(9) back in November, now
24 objects to it. And I think that's the issue where they
25 can't really blow hot or cold on these facts.

1 MS. KRAEMER: Your Honor, if I may, Salene Mazur
2 Kraemer. We are in that same exact boat and now that
3 counsel --

4 THE COURT: Ma'am, I've already ruled on your
5 constructive trust claim.

6 MS. KRAEMER: Yeah. I just wanted to say we're in
7 the same boat with respect to the representations by the
8 Debtor right at the filing of the case. And we did submit
9 those emails in the adversary proceeding where the Debtor
10 directed our client to go ahead and check that box.

11 THE COURT: Are they part of your opposition --
12 are they part of your opposition to the claim objection?

13 MS. KRAEMER: Yes, I believe they are, Your Honor.
14 I'll have to double check that. I believe we did put that -
15 - actually, I'm not -- I believe we did. I can double
16 check. I know for sure we put it in our Complaint and the
17 adversary proceeding. I need to pull that up, Your Honor.

18 THE COURT: No, don't pull up the adversary
19 proceeding. That's not --

20 MR. FLAHAUT: Just to complete it and then I'll
21 cede the floor, Your Honor, if I may. This is Doug Flahaut
22 again from Arent Fox LLP. I -- So, Your Honor has focused
23 on the estoppel argument, I think, correctly. I would note
24 again that the opposition was not the kind of detailed
25 points and authorities that I typically would like to give a

1 Court on the estoppel issue because it was hastily put
2 together on the last day after I realized no further
3 extension was going to be granted.

4 Looking at the reply, I have reviewed the Debtors'
5 discussion of the estoppel argument and I think there are
6 some issues with it. The first is that I'm not sure the
7 Debtor really has the correct estoppel standard in the sense
8 that, I think there's federal estoppel and also estoppel
9 under state law and I believe the standards are different.
10 In my review of the Debtors' reply, I think, reading those
11 cases, are that some of them were applying state law
12 estoppel -- the state law estoppel standard whereas, I
13 believe, this would be a federal estoppel standard applied
14 in this case. And the Second Circuit case of Kosakow v. New
15 Rochelle Radiology, that's 274 F.3d 706 (2d Cir. 2001),
16 states the federal law standard, which has three factors,
17 not four like the Debtor put in their reply. It says, under
18 federal law -- this is a quote, "Under federal law, a party
19 may be estopped from pursuing a claim or defense where (1)
20 the party to be estopped makes a misrepresentation of fact
21 to the other party with reason to believe the other party
22 will rely on it, (2) the other party reasonably relies upon
23 it, (3) to her detriment." And I think we --

24 THE COURT: But the reasonable reliance issue is
25 the real issue here. I mean, the goods had already been

1 shipped, right?

2 MR. FLAHAUT: The goods had been shipped. The
3 reliance aspect of it, Your Honor, is that we relied on it
4 by not seeking to recover our money through other
5 mechanisms, which we believe would, potentially, have been -
6 -

7 THE COURT: But, there's no segregation of the
8 money, right?

9 MR. FLAHAUT: We don't know. Certainly not now.

10 THE COURT: No, no. I mean, under the parties'
11 agreement.

12 MR. FLAHAUT: I do not know, Your Honor. I do not
13 have the Agreement in front of me. I don't believe it was
14 put in the record in connection with the objection to this
15 claim.

16 THE COURT: No, but you're the one arguing
17 estoppel.

18 MR. FLAHAUT: Right. Well, and I can tell you
19 that we would -- that my client has informed me, and I
20 believe they are correct on this, that they would have
21 pursued recovery of these monies differently and more
22 aggressively if they had not been lulled into believing that
23 they had a 503(b)(9) claim for the goods with it shipped
24 within 20 days.

25 THE COURT: Well, that could just have meant,

1 though, that they would have spun their wheels. Just as VMI
2 did in making a constructive trust argument, which I ruled
3 on, they had no basis for, and it wasn't just based on the
4 inability to trade.

5 And then secondly, as far as the critical vendor
6 point is concerned, it's not based on pressure from the
7 other party, it's based on an analysis of a number of
8 factors that -- I just -- I'm quite skeptical that if one's
9 talking about burden here, that somehow, you've carried your
10 burden on estoppel.

11 MR. FLAHAUT: Well remember, Your Honor, it's the
12 Debtor carrying the burden. We've got burdens of proof
13 here. Only --

14 THE COURT: I'm sorry, sir. If you cannot, in
15 good faith, tell me that the goods were physically
16 delivered, then they have rebutted that issue.

17 MR. FLAHAUT: Okay.

18 THE COURT: I mean, come on, this email doesn't
19 say anything acknowledging physical delivery of goods.

20 MR. FLAHAUT: Correct, Your Honor. It only says
21 that the goods had been delivered sufficiently for 503(b)(9)
22 under the proof of claim --

23 THE COURT: No, it doesn't say that either. But
24 it certainly doesn't talk about physical delivery or
25 delivery to an agent or a bailee. And that's what the basis

1 for the objection is and, you know what, I could adjourn
2 this, but you're going to have to amend your claim or
3 actually show me that there was physically delivered before
4 we even think about convening another hearing.

5 MR. FLAHAUT: Well, Your Honor, obviously we've
6 been -- we're trying to work out a consensual deal with this
7 Debtor for months now and if a continued hearing would allow
8 us time to discuss the matter, I would certainly take that
9 from the Court.

10 THE COURT: Okay. I'm fine with that. I really
11 don't think you've carried your burden on estoppel, which
12 really is your burden here, such as not part of the claim
13 and -- I mean, it's not alleged anywhere.

14 MR. FAIL: Your Honor, even if it was alleged, it
15 doesn't give priority. We're not saying, again, we're not
16 challenging --

17 THE COURT: Look, I'm going to give you all my
18 ruling, which, just as a preference is that physical
19 delivery or delivery to a bailee or an agent for delivery,
20 at least has to be shown here. So, they know that, (a) and
21 (b), as far as whether they can show physical delivery or
22 not, they also know that they're going to be wasting their
23 time if they can't do that.

24 And as far as estoppel is concerned, I think you
25 can tell that I think it's a very slim reed. So, I don't

1 see any reason not to adjourn it so that you can try to
2 resolve this without further litigation. I mean, the
3 estoppel point here is one where, under either standard,
4 reliance is key, and the notion that they would have pursued
5 some other avenue in the case given their rights, I think is
6 highly questionable. But we don't have their agreement and
7 let's just leave it at that.

8 So, going back to Ms. Kraemer's matter, your
9 pleading did not include any emails on it.

10 MS. KRAEMER: Your Honor, no, it was in the
11 Constructive Trust Complaint, Your Honor.

12 THE COURT: Right, okay. Which I dismissed. So,
13 are any of the other objections, counsel, wanting to go
14 forward and speak?

15 MR. WANDER: Yes, Your Honor. This is David
16 Wander of Davidoff Hutcher & Citron, counsel for Stolaas
17 Company, if I may be heard.

18 THE COURT: Sure.

19 MR. WANDER: Your Honor, first, in a nutshell, my
20 client has an equitable estoppel argument. Stolaas provided
21 goods for the Debtors for approximately seven years through
22 the Sears Marketplace beginning in about 2011.

23 Historically, the Debtors paid Stolaas daily --
24 this is a very important point -- with direct payments to
25 Stolaas' bank account with a 14-day lag, which represented

1 the credit terms. Several months prior to the Debtors'
2 bankruptcy filing, these payments stopped, but Sears kept
3 reporting the goods delivered by Stolaas as having been
4 paid, meaning Sears collected the money.

5 Numerous emails sent by Sears to Stolaas claimed
6 that Sears deposited funds into Stolaas' account as payment
7 for the goods delivered when, in fact, those deposits were
8 never made. Attached to the response by Stolaas are
9 numerous emails showing the fraud that was perpetrated.

10 Now because my client was told that these were
11 computer errors, my client kept delivering the goods. Now
12 it's important here -- if Sears generated falsified
13 remittance reports showing non-existent deposits into
14 Stolaas' account with fictitious EFT numbers, while no
15 payments were made after the Sears EFT date of September 11,
16 2018, remittance reports continued populating on the Sears
17 website stating that the deposits were being regularly made
18 on September 12th, 13th, 14th, 17th, 19th, etc., all the way
19 through October 9th, less than one week before the
20 bankruptcy filing. The total amount of the fictitious
21 deposits reflected on the Sears remittance reports is
22 \$104,605.00.

23 Now, in various emails during this period, Sears
24 claimed that the delays in payment were due to computer
25 problems. In addition, during this time, there were some

1 payments that were received by my client which induced my
2 client to continue shipping goods. It was not until after
3 Sears filed for bankruptcy that Stolaas realized that a
4 fraudulent scheme had been in place to induce Stolaas to
5 continue shipping goods to Sears, including during the 20
6 days leading up to the bankruptcy filing.

7 Had Sears not induced Stolaas to continue shipping
8 goods that were sold in the Sears Marketplace with falsified
9 remittance reports and fraudulent emails, Stolaas would have
10 stopped delivering goods. Based on the facts and equitable
11 principles, the goods sold by Stolaas should be considered
12 to have been delivered by the Debtors. Now, Judge --

13 THE COURT: Why? Why? I don't understand. Why?
14 You mean delivered to the Debtors?

15 MR. WANDER: Correct. What we're saying is --

16 THE COURT: But on what grounds? They weren't.

17 MR. WANDER: So, it's the estoppel defense. It's
18 the equitable estoppel should bar the Debtors from raising
19 the defense that the goods were not delivered to the Debtors
20 or received by the Debtors. Because, Your Honor, the Estate
21 received a windfall through the fraudulent conduct of the
22 Debtors' pre-petition. Had they not fraudulently induced my
23 client to continue shipping goods, the Estate would not have
24 had that cash on hand when they filed for bankruptcy. Now -

25 -

1 THE COURT: But Mr. Wander, that -- I mean, let's
2 just assume that instead of -- I'm assuming, for purposes of
3 this hearing, that your allegations of fraud are accurate,
4 okay? For purposes of this hearing, because the focus of
5 this hearing is just on the administrative expense under
6 503(b)(9). So, let's say, instead of keeping the money, it
7 actually -- one of its agents went to your client's office
8 and robbed the money. As far as Sears is concerned, that
9 would just be a pre-petition claim.

10 MR. WANDER: Your Honor, so, had an employee of
11 Sears robbed my client, the estate would not have gotten
12 those funds and I would agree, my client would --

13 THE COURT: All right. Let's say he gave the
14 money to Sears. It has nothing to do with 503(b)(9). It's
15 just a pre-petition forge claim.

16 MR. WANDER: Yes, I'll tell you why it does, Your
17 Honor. Because this was not a robbery, this was a
18 fraudulent scheme to induce my client to ship goods so the
19 debtor could load up on inventory and load up on cash going
20 into the bankruptcy. Now, Your Honor, the same thing
21 happened after the Transform sale. Now, this is --

22 THE COURT: Mr. Wander, do you have any caselaw
23 even remotely on point on this issue?

24 MR. WANDER: The caselaw on equitable estoppel,
25 which counsel for Sky Billiards mentioned before and which

1 was the discussion, okay --

2 THE COURT: So, the answer is no. This objection
3 is granted. This is a pre-petition tort that is alleged in
4 the objection. Pre-petition torts to the extent it's
5 proven, and that's not the issue for today, are pre-petition
6 claims. There's absolutely no basis for estoppel here.
7 There was no delivery and I'm sorry, Mr. Wander, there's a
8 point where creative law just has to stop, and you've
9 reached that point here. There is no estoppel here. There
10 is no estoppel alleged in the claim, there are no cases
11 cited, and there's a good reason for that. None could be.

12 MR. WANDER: Well, Your Honor --

13 THE COURT: 503(b)(9) is a specific provision and
14 the elements of that provision are not shown here, there's
15 no representation that even ties into rights under 503(b)(9)
16 that were somehow not asserted and consequently, there was
17 reliance on something where those rights were not asserted.
18 Moreover, the failure to assert those rights in light of the
19 misrepresentations that you've alleged, would not have been
20 replaced by any post-petition rights that your client would
21 have had, such as the billiard company asserted, oh, we
22 would have, instead, asserted a constructive trust or, oh,
23 you would have asserted a critical vendor point. Just not
24 the case here.

25 Your client, as you said, became aware of this

1 pre-petition. So, enough.

2 MR. WANDER: No, that's not --

3 THE COURT: This objection is granted. This
4 objection is granted. This is not a priority claim.

5 MR. WANDER: Your Honor, could I just address the
6 comment?

7 THE COURT: Very briefly.

8 MR. WANDER: In paragraph 12 of Stolaas' response,
9 it says, Stolaas reserves its right to amend its response to
10 include additional arguments in support of its
11 administrative claim. Additionally, Stolaas reserves its
12 right to file a response to any reply filed by the debtors.
13 Because the debtors' claim objection fails to include any
14 facts or law, Stolaas can only guess what grounds underlies
15 the debtors' claim objection.

16 The reason there was no caselaw in this, is
17 because there was no caselaw or even mention of the Sears
18 Marketplace in the debtors' initial objection. All it said
19 in the debtors' objection was that, according to the
20 debtors' books and records or review of the debtors'
21 records, reveals that the goods were not delivered within 20
22 days. Period. Nothing about Sears --

23 THE COURT: But that's not disputed, right? You
24 don't dispute that, do you?

25 MR. WANDER: Well, in the reply by the debtors,

1 Your Honor, in the reply, where I believe they
2 mischaracterize Stolaas' claim as a fraudulent inducement
3 claim instead of that is supporting the 503(b)(9) claim, the
4 debtors said in paragraph 20, courts generally do not
5 consider arguments that are raised for the first time --

6 THE COURT: No, I'm not relying on that. I'm
7 relying on what you just told me. I'm relying on what you
8 just told me and what you just told me doesn't hold water.
9 I'm sorry. It's undisputed that the debtors' assertion that
10 the goods were not physically delivered or delivered to a
11 bailee or an agent for receipt of the goods, that's
12 undisputed. And what the claim is based on is a series of
13 alleged fraudulent representations to your client pre-
14 petition. And the two don't -- that may give rise to a
15 claim, but it doesn't give rise to a claim under 503(b)(9),
16 which is what the claim is for.

17 So, I don't care whether you didn't raise it or
18 did raise it, it's just not going to fly. So, I'm granting
19 this objection without prejudice to any claim that you've
20 asserted on a pre-petition basis or in a timely manner.

21 MR. FAIL: Thanks, Your Honor. For the record,
22 again, Garrett Fail from Weil for the Debtors. So, does
23 that cover -- hopefully that covers every claim that's going
24 forward today based on --

25 THE COURT: Well, I don't know. There were -- I

1 think there were --

2 MR. FAIL: We could hear from others. I would
3 just also, for the record --

4 THE COURT: There were some responses from
5 companies that I have not yet heard from.

6 MR. FAIL: That's fine. We can -- and we should
7 consider to make -- we should go forward to make sure
8 everyone's heard. I would just, again, point the Court to
9 Section 503(b)(9), which requires that value of goods
10 received by the Debtor for goods that have been sold to the
11 Debtor in the ordinary course.

12 Our argument, and it's undisputed thus far, is not
13 only was there no receipt, but goods under this Marketplace
14 Agreement were not sold to the Debtors, they were sold to
15 third party customers. Nothing, so far, has contested that
16 fact and nothing in 503(b)(9), as Your Honor said, gives
17 priority for other tort causes of action. So, even if
18 they're right, as Your Honor is accepting for purposes today
19 and as we did, but not for any other reason, there's no
20 503(b)(9) priority. We're happy to continue to look into
21 other -- the other parties and make sure that we could go
22 forward and get rid of all these claims.

23 THE COURT: Is there anyone else on the phone who
24 wants to address or speak on behalf of any of the
25 objections?

1 MS. KRAEMER: Your Honor, Salene Kraemer again.
2 Can you just -- for purposes of me being able to explain to
3 my client, so, how is the comity carrier not an agent of the
4 Debtor --

5 THE COURT: I will give you a ruling, ma'am, but
6 your own paper says that Sears was the agent for the
7 plaintiff, so, I think you should point that out to them.

8 But, is there anyone else on the phone on this
9 matter? All right.

10 I have before me the debtors' second omnibus
11 objection to asserted claims under Section 503(b)(9) of the
12 Bankruptcy Code, which creates a statutory priority
13 notwithstanding, unlike all of the other statutory
14 priorities -- well, maybe a couple of exceptions in 503(b)
15 of the Bankruptcy Code -- creates an administrative expense
16 with respect to pre-petition obligations as with any
17 administrative expense as stated by the court in the Howard
18 Delivery Service case. Administrative expenses, including
19 under 503(b)(9), take away from the normal priority scheme
20 of the Bankruptcy Code and unless there is any other strong
21 policy arguing to the contrary, should be read narrowly.

22 503(b)(9) of the Bankruptcy Code says that there
23 shall be an allowed administrative expense for, "the value
24 of any goods received by the debtor within 20 days before
25 the date of commencement of the case under this title in

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1 which the goods have been sold to the debtor in the ordinary
2 course of such debtor's business.."

3 The objectors here, including those who have had
4 counsel speaking at today's hearing, are participants or
5 were participants in the Sears Marketplace selling activity
6 whereby, on the Sears internet site, they sold goods to
7 customers with payment to Sears. The goods were delivered
8 to the customers and were never delivered to the debtor or
9 sold to the debtor.

10 By the plain terms of Section 503(b)(9),
11 therefore, they would not be entitled to a statutory
12 priority. This argument has never been directly made in the
13 context of a Marketplace Agreement like this, although it
14 has been closely addressed before in ADI Liquidation, Inc.
15 572 B.R. 543-544 (Bankr. D. Del. 2017) and generally
16 speaking, the requirement for physical delivery or, at a
17 minimum, constructive possession through an agent or bailee,
18 in numerous cases, including In re O.W. Bunker Holding North
19 America, Inc. 607 B.R. 32, 43-44 (Bankr. D. Conn 2019) and,
20 In re SRC Liquidation, Inc. from the District Court of
21 Delaware 573 B.R. 537, 542 (Bankr. D. Del. 2017).

22 The objection did not dispute that there was not
23 physical delivery of the goods to the debtor or sale of the
24 goods to the debtor, but rather have raised arguments to the
25 effect that the debtor nevertheless should be charged with

1 having received the goods on various theories, one of which
2 comport with the statutes, including, as asserted by VIR,
3 AMI that Sears was the agent for the claimants, not having
4 any agency relationship where its agent received the goods.

5 Although it has also been argued by the same
6 creditor that the shipping service, whether it was UPS,
7 FedEx or some other service, was Sears' agent,
8 notwithstanding the lack of any proof or assertion that such
9 shipper had a relationship with Sears as opposed to the
10 claimant. In any event, the statute's plain language simply
11 hasn't been satisfied and the statutory priority therefor
12 should not lie.

13 As far as the arguments regarding estoppel are
14 concerned, that the debtor may have engaged in some form of
15 tort or misconduct pre-petition that induced a claimant to
16 ship goods pre-petition, does not give rise to a post-
17 petition claim for estoppel and clearly does not do so under
18 Section 503(b)(9). The representations alleged by Stolaas
19 do not affect the 503(b)(9) nature of the claim.

20 As far as Sky Billiards is concerned, there was a
21 post-petition communication that arguably could give rise to
22 an estoppel argument on a post-petition basis. However,
23 when one examines the email, it is not an acknowledgment of
24 a claim that could reasonably be relied on as to the nature
25 of the claim, although it may have misled or caused the

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1 claimant to rely on the assertion of the claim holding up.

2 But whether that reliance was the cause of any
3 harm remains to be seen and, as I said during oral argument,
4 I'm skeptical that it could be shown. It would be need to
5 be based upon some theory that some right had been lost to a
6 priority or to a specific 100 percent payment, both of which
7 I'm quite skeptical about, but I'm prepared to adjourn based
8 on my review, if it comes, of a supplement to the claim that
9 would credibly make such an argument.

10 As far as the other objections are concerned, the
11 delivery argument is key and has not been addressed
12 sufficiently to overcome the debtors' objection. So, I will
13 grant the objection as to all claims except Sky Billiards
14 and I will adjourn the hearing on that provided that Sky
15 Billiards sufficiently amends its claim at least 14 days
16 before the hearing. So that probably means the hearing
17 would be adjourned to June. But if you can get it in before
18 then, then I'll hear it in May.

19 MR. FLAHAUT: Your Honor, this is Doug Flahaut
20 from Arent Fox on behalf of Sky Billiards. I would probably
21 prefer the June date just to allow --

22 THE COURT: That's fine. It's up to you. I'm
23 just saying I'm giving you the choice. But I'll look for an
24 order from the debtors otherwise granting the claim
25 objection, which, again, is solely as to the priority nature

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1 of these claims pursuant to 503(b)(9) of the Bankruptcy
2 Code. And you can, obviously, from the schedule, leave out
3 Sky Billiards and reference the adjourn date in the order.

4 MR. FAIL: Thank you, Your Honor. This is Garrett
5 Fail from Weil Gotshal on behalf of the Debtors. We'll
6 submit an order in accordance with the Court's direction.
7 We appreciate your time this morning on these claims
8 matters.

9 The next item on the agenda -- oh, go ahead --
10 will be handled by my colleague and partner, Jackie Marcus.

11 MS. MARCUS: Hi. Good afternoon, Your Honor,
12 Jacqueline Marcus on behalf of Sears Holdings Corporation.

13 This is the motion of Santa Rosa Mall and as
14 you'll recall, Your Honor, at the February 24th hearing, you
15 had granted Santa Rosa Mall additional time to file a
16 supplemental briefing. I don't know how you'd like to move
17 forward this afternoon.

18 THE COURT: Well, I've reviewed those briefs and
19 so you all should assume that, which are Santa Rosa's
20 briefs, the debtors' reply and Santa Rosa's response to
21 that. I guess I'm happy to hear from Santa Rosa's counsel
22 at this point.

23 MR. RIOS: Thank you, Your Honor. My name is
24 Carlos Rios. I'm one of the attorneys for Santa Rosa Mall
25 and with me are attorney Sonia Colon and Gustavo Chico. I

1 will address the issues concerning the memorandum of
2 insurance. If it relates to other matters, then either
3 Sonia Colon or Gustavo Chico will address those issues.

4 THE COURT: Okay.

5 MR. RIOS: The first thing that I'd like to say,
6 Your Honor, is that the classic example of first party
7 insurance is property insurance. That's what this case is
8 all about and that's what we discussed in our memorandum of
9 insurance. The right to be insured in the Sears policy
10 arises from the lease contract.

11 We cited Section 601, we called for Sears to
12 provide insurance for the benefit of landlord and tenant
13 with respect to the demised premise, which works as the
14 respective interest may appear, which is the standard
15 language used.

16 Accordingly, the insurance contract included Santa
17 Rosa as an additional named insured and that appears, Your
18 Honor, in the first page of the insurance contract where the
19 insured is defined. And it's defined as follows, it
20 mentions Sears and its affiliates, without mentioning the
21 name of Santa Rosa, yet its name was clearly implied when it
22 said, any other party for which the insured has the
23 responsibility for providing insurance and as their
24 respective interest may appear. I covered that in our
25 memorandum at pages 3, 6, 4, 19 and 28, with cases, and

1 juris prudence and authorities.

The objective of first party indemnity is to fulfill the insured reasonable expectations. That objective comports with the classic function of the contract theory and contract remedies to fulfill the reasonable expectations of the contracted parties. The underwriters know this and also were aware of Santa Rosa insurable interest in the property because Santa Rosa was implied in the policy.

9 Furthermore, the damages occurred in September
10 2017. The case was settled in January 2018. That's 16
11 months after. The underwriters had plenty of time before
12 paying Sears to find out who the other insureds were, but
13 they did not. An insurance company cannot ignore a party
14 insured because another party insured tells them otherwise.
15 We cited cases. You end up paying twice when you do that.
16 We also mentioned that in the Memorandum. Furthermore --

THE COURT: I'm sorry. Could I interrupt you?

18 MR. RIOS: Of course.

19 THE COURT: The only cases I see -- really, the
20 only case I see is the Farmers case from Texas.

21 MR. RIOS: Yes.

22 THE COURT: And it is not clear to me that that
23 stands for the proposition that the insurer paid twice.
24 What support do you have for that? Maybe I missed it.
25 Because let me back up for a second, and maybe I should h

1 done this at the start of the hearing, and I apologize for
2 not having done it. The reason I asked Santa Rosa to brief
3 whether it has a direct right against the insurer was
4 whether that right was somehow separate from the policies.
5 And the reason for that is that under the settlement and
6 release agreement between Sears and the underwriters, Sears
7 represented that, in paragraph 4, this agreement resolves
8 all claims for the applicable policy period, including any
9 and all claims that Releasor or any other party made, could
10 have made or could make in the future under the policies for
11 the hurricane loss. And then paragraph 5 states release of
12 further warrant that Releasor is the only party of interest
13 with regard to the hurricane loss.

14 So, the Debtors have argued that this has already
15 been dealt with and any attempt by Santa Rosa to go against
16 the underwriters at this point would immediately give rise
17 to liability under paragraphs 4 and 5 and then, of course, 6
18 is the hold harmless provision for paragraph 4 and 5. And T
19 the prior hearing that we had, I said that I understand or I
20 thought that Santa Rosa was making an argument that it had a
21 direct right against the insurers not grounded on the
22 policies. And you put it quite clearly just now. It would
23 in essence mean that the insureds would have to pay twice
24 because they have a separate, an independent duty. Not just
25 a right under -- not just that the policy gave the mall the

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1 right to be paid the money based on the policy itself. And
2 frankly, that's how I read the Farmers case, the latter
3 scenario.

4 So, do you have any authorities for the
5 proposition that the insurers have to pay twice, separate
6 and apart from the policy, they have an obligation not to
7 have paid the money out to Sears?

8 MR. RIOS: We cited a case. It's a Puerto Rico
9 case, I don't have the case right in front of me, but it's a
10 Puerto Rico case that involved a flood damage and they paid
11 the wrong person. So, the issue was resolved against the
12 claimant because there was no insurance. There had been a
13 misrepresentation that had been made in the policy and as a
14 consequence of that the claimant could not collect.

15 In our case, Your Honor, the underwriters cannot
16 claim that they didn't know that Santa Rosa was an
17 additional insured because they appointed, they authorized
18 Aon to issue the certificates, they authorized Aon, as their
19 agent, to keep all the documents, all the records. So, the
20 underwriters knew or should have known --

21 THE COURT: But that case is distinguishable
22 because the insurer paid someone that wasn't a named insured
23 whereas Sears was a named insured.

24 MS. MARCUS: And Your Honor, if I may interject.
25 This is Jacqueline Marcus.

1 MR. RIOS: The decision not to pay -- are you
2 talking about the Texas case, Your Honor?

3 THE COURT: No, no. I'm talking about the one you
4 just summarized for me.

5 MR. RIOS: Yes, the one I summarized, the
6 claimant's claim was denied because of the -- because the
7 insured made -- represented some facts that under the
8 federal law -- under the Flawed Insurance Act, they were --
9 the policy was null and void. But allow me, sir, to go back
10 to the original issue here. My client has a separate and
11 distinct action against the underwriter, which does not
12 depend on the -- upon the -- Sears or Debtors. Debtors --

13 THE COURT: I'm sorry. Let me -- this is the key
14 point. How does that action not depend upon the policy
15 itself?

16 MR. RIOS: Well, it depends upon the policy, of
17 course, because if you don't have an insurable interest, you
18 cannot claim on the policy. Both parties here, Sears and
19 Santa Rosa, had an insurable interest on the insurance
20 policy. So, consequently, they are both first party insured
21 and they have a direct action against the insured -- I mean,
22 insurance company.

23 THE COURT: Except the insurance company's already
24 paid to the other insured.

25 MR. RIOS: Well, the insurance company should have

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1 paid the amount that Sears was entitled to receive as its
2 interest may appear. Now, if they went beyond that and they
3 paid in excess of the interest that Sears had, well, they
4 have to pay twice. But, I'm --

5 MS. MARCUS: Your Honor --

6 THE COURT: Hold on Ms. Marcus for a second. But
7 aren't you just assuming that? I mean, I don't -- I don't --
8 -

9 MR. RIOS: I don't have any other way to know,
10 Your Honor, because we --

11 THE COURT: No, but how would it be in excess, as
12 their interest may appear? That's where I'm having a hard
13 time --

14 MR. RIOS: Of course. Of course. The policy
15 itself describes what -- how is the payment distributed in
16 the case of a lessor, in the case of a mortgagor. I mean,
17 this insurance policy was made to protect Sears. That's why
18 they have this blanket named insured.

19 THE COURT: I'm sorry. Where does it say that?

20 MR. RIOS: In the policy.

21 THE COURT: But, I mean, I don't -- I guess --

22 MR. RIOS: I didn't mention that in the
23 Memorandum, Your Honor, but the policy --

24 THE COURT: I know.

25 MR. RIOS: -- makes reference to mortgagors and

1 makes reference to lessors and lessees.

2 THE COURT: First of all, I guess I have two
3 points, two questions. The Memorandum says, citing the one
4 case, I think, the Farmers case, Farmers Insurance Exchange
5 v. Nelson 479 S.W.2d 717, 721 and there are some other cases
6 in that case that are cited, (Tex.Civ.App. 1972), for the
7 proposition that once the insurer becomes aware of an
8 agreement to include a loss payee under the terms of
9 insurance policy, the duty rests upon the insurer to treat
10 the proceeds of the policy as though such a provision was
11 written into the policy. And the argument is made that
12 there was sufficient disclosure in the policy, along with
13 the certificate, so that the underwriters would know that it
14 would include, although not specifically identified, Santa
15 Rosa as a landlord.

16 MR. RIOS: Yes.

17 THE COURT: But Sears also is the beneficiary of
18 the policy and I don't see anything to show that the insurer
19 is liable for having paid Sears as opposed to Santa Rosa.
20 And I don't see how there's a direct action against the
21 landlord having already paid Sears.

22 MR. RIOS: Your Honor, the issue here is clearly
23 stated in the definition of the additional insured. When it
24 says, as their respective interest may appear. Let's say
25 that a landlord is included in the policy, its name and

1 everything in the policy. The landlord sells the property
2 to another person. The landlord that is included in the
3 policy has no insurable interest in the property, so he
4 cannot collect. Regardless of the fact that his name was on
5 the policy.

6 THE COURT: Okay, go ahead.

7 MR. RIOS: Yes. And that's why -- I mean, you
8 have a --

9 THE COURT: So, when was the payment here? And
10 what was Sears' interest at the time?

11 MR. RIOS: As a lessor? As a lessee? I'm sorry,
12 Your Honor, as a lessee.

13 THE COURT: Okay. All right. The property hadn't
14 been sold and it is still the lessee.

15 MR. RIOS: Yes. So, I'm entitled to participate
16 in the proceeds of the insured -- in the insurance.

17 THE COURT: But what is missing here is whether --
18 you may be entitled, somehow, to participate in the proceeds
19 of the insurance.

20 MR. RIOS: The underwriter.

21 THE COURT: The question is whether you have a
22 separate cause of action, separate and apart from the
23 policies, against the underwriters for paying the money over
24 to Sears.

25 MR. RIOS: Your Honor, our case depends upon the

1 contract of insurance. That's the whole basis of our
2 Memorandum. But we have a separate and the distinct right
3 from that of Sears. I mean, the two could work together.
4 There's cases on that. I mean, there's stateside cases
5 referring to how the monies are distributed. But what is
6 consistent in all the juris prudence that I have reviewed,
7 Your Honor, I have been in practice -- I've been practicing
8 law for 55 years.

9 I was Insurance Commissioner of Puerto Rico for
10 two years and I've been involved in contracts of insurance.
11 There's some basic principles of insurance, like I said, if
12 you don't have insurance, you can't collect. So --

13 THE COURT: But Sears had an insurable and insured
14 interest.

15 MR. RIOS: I beg your pardon, sir.

16 THE COURT: But Sears had an insured interest.

17 MR. RIOS: I don't understand. What?

18 THE COURT: Sears had an insured interest.

19 MR. RIOS: Of course, it had, but it's separate
20 and apart from the one that my client. That's why I believe
21 that the indemnity has no purpose. Because if the
22 underwriters paid Sears what Sears was entitled to receive,
23 they have no recourse against Sears. If, on the other hand,
24 if the underwriters paid in excess and obtained or made
25 payments through Sears that belonged to my client, to the

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1 landlord, then we will have a case against the underwriters.
2 The underwriters will have to decide -- that's an issue to
3 be decided in Puerto Rico and --

4 THE COURT: Do you have any cases to support that
5 proposition?

6 MR. RIOS: Well, Your Honor, I mean, we cited the
7 case of -- let me see, I have it right here -- the case of
8 Capital Markets vs. Municipality of Bayamon. It says ergo
9 while payment might be made in good faith for the person who
10 is in possession of the credit shall release the debtor.
11 But payment otherwise made to a third person is deemed
12 invalid unless it may have been beneficial to the creditor.
13 I mean, what the underwriters --

14 THE COURT: But that was a third person who didn't
15 have the insurable interest.

16 MS. MARCUS: Your Honor, I know you asked me to
17 wait, but --

18 MR. RIOS: I'm referring to the principle, Your
19 Honor. I'm referring to the principle because the Civil
20 Code has a series of sections that talk about this third
21 party and the rights of a beneficiary. So, you have to
22 integrate the whole law, the whole system, civil law system
23 which is statutory and contains all the provisions regarding
24 the obligations that they go beyond the Insurance Code
25 because the Civil Code supplements what the Insurance Code

1 does not cover.

2 So, I believe that Sears will be able to defend
3 itself if they receive what they should have received. And
4 if the underwriters didn't pay what they had to pay to Santa
5 Rosa, they have to pay Santa Rosa because Santa Rosa was
6 disregarded without any legal authority or any present.
7 They had no right to do that. The underwriters knew letters
8 were written to the underwriters before they entered the
9 settlement. And of course, Sears knew about it when they
10 misrepresented the fact that that there was nobody else
11 involved or had any rights to the insurance proceeds. So,
12 we have a situation here that, I believe that we covered
13 aptly in our Memorandum and it was not notified.

14 THE COURT: Do you have cases for the proposition
15 that if the underwriters knew someone was asserting an
16 interest as a loss payee. No, let me finish. That they
17 should withhold payment to the other insured party until
18 that party's interests are taken into account?

19 MR. RIOS: Yes, Your Honor. You're paying the
20 wrong party. Of course, there's mostly cases of that, but I
21 mean, they're paying someone that's not entitled to receive
22 the monies. The monies did not benefit my client because
23 had Sears repaired and restored the store, then we wouldn't
24 be complaining.

25 THE COURT: I'm just asking if you have any cases.

1 I'm asking if you have any cases here.

2 MR. RIOS: We could cite some cases, Your Honor,
3 yes.

4 THE COURT: I thought that was the purpose of this
5 Memo.

6 MR. MARCUS: Your Honor, this is Jacqueline
7 Marcus. Before we go too much further, I wanted to respond
8 to a couple of points.

9 I know that Santa Rosa's arguing that they are an
10 insured under the policy, and I think you know, based on our
11 papers, that we dispute that. But I think we can all agree
12 that if Santa Rosa were considered an insured under the
13 policy, that they would be bound by the terms of the policy.

14 In Section 53 of the policy, which is entitled, "Loss
15 Payable", says, and I quote, "Loss, if any, shall be
16 adjusted with and payable to Sears Holding Corporation or as
17 directed by it." And Paragraph 19 has similar language
18 talking about how a claim is asserted and how it's adjusted.
19 So, even if Santa Rosa were correct that it's an insured
20 covered by the policy, I fail to see how there would be any
21 argument that the underwriters paid the wrong party. They
22 did exactly as they were required to do under Section 53 of
23 the policy.

24 MR. RIOS: Could I address that issue, Your Honor?

25 THE COURT: Sure.

1 MR. RIOS: We covered that in the memorandum. We
2 covered it in the memorandum. We said you have to read
3 Paragraph 53 with Paragraph 51 that says that each of the
4 insureds insured by this policy will have the same
5 protection and obligations as if the policy had been issued
6 individually to each of them. The intent of an insurance
7 policy is to provide insurance to the insured, to provide
8 and protect, that's the intention. If there's any doubt in
9 interpreting these conflicting paragraphs, it would favor
10 the insured. We covered that extensively by referring to
11 how to interpret an insurance policy and --

12 THE COURT: Well, you -- I'm actually at that
13 section and it is at pages 27, 28 and 29 and there's
14 literally no authority, other than a general provision in
15 the Puerto Rico Civil Code that states the following, If the
16 terms of a contract are clear and leave no doubt as to the
17 intentions of the contracting party, the literal sense of
18 its stipulations shall be observed. If the words appear to
19 be contrary to the evident intention of the contracting
20 parties, the intent shall prevail.

21 So, I really don't see the support for what you've
22 just said to me, that this is somehow embodied in the
23 insurance law.

24 MR. RIOS: Well, it's in the Civil Code, Your
25 Honor, and when you interpret --

1 THE COURT: No, I just read the provision, but
2 paragraph 53 is specific and paragraph 601 is general and
3 602.

4 MR. RIOS: Well, but --

5 THE COURT: Doesn't paragraph 53 deal with the
6 issue of payment and adjustment whereas the issue covered by
7 601 and 602 is as far as the parties covered by the policy?

8 MR. RIOS: Well, yes, Your Honor. It does
9 authorize Sears to adjust and collect the payment. What it
10 doesn't do is authorize the underwriters to pay the total
11 amount due Sears disregarding Santa Rosa's rights as an
12 additional insured. That is the issue here.

13 THE COURT: Well, all right. Is there any support
14 for that proposition, other than Puerto Rico's version of
15 the plain meaning rule?

16 MR. RIOS: The plain meaning rule? The plain
17 meaning rule -- there is some ambiguity here. Here are two
18 clauses. The entire contract refers to the definition of
19 the insured, the entire contract. It goes back and forth.
20 They authorize the agent, the broker who's performing a dual
21 role or broker and agent to issue the certificates. The
22 certificates evidence the existence of the rights of Santa
23 Rosa. They cannot be disregarded. There's no provision in
24 the insurance contract or anywhere that you could disregard
25 one insured's rights versus another. They're both named

1 insureds. So, it's --

2 THE COURT: The contract itself specifies, I
3 think, how it's supposed to be adjusted, through Sears.

4 MR. RIOS: Of course, and I agreed with you, Your
5 Honor.

6 MR. MARCUS: And Your Honor, there's a very
7 (indiscernible) reason for that because the insured, the
8 underwriters don't want to get involved in dealing with
9 various landlords or other parties that might have an
10 interest in the insurance proceeds. Their view is, Sears is
11 the insured party. They pay Sears and then Sears deals with
12 it.

13 MR. RIOS: Your Honor, that's the case of Nickels
14 that we cited -- that we included -- a cite in the
15 memorandum and the standard practice is, before the
16 insurance company pays, they find out if there's any other
17 additional insureds involved and they make sure, they issue
18 the check, the check in the names of the two parties.

19 In this case, in the case of Nickels, a check was
20 written in the name of the two parties and the insured
21 falsified the endorsement and the Court said, look, I mean,
22 you have to be more careful, insurance company. You have to
23 watch out, you have to make sure that you're paying the
24 right party and you're delivering the check to both. Which
25 is what the lease contract provides, the monies to be

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1 deposited in a joint account. But --

2 THE COURT: I'm sorry -- Nickels. I don't see
3 Nickels in your list of cases.

4 MR. RIOS: Let me see, Your Honor.

5 MS. MARCUS: It's there, Your Honor. It's
6 Blackburn-Nickels & Smith.

7 MR. RIOS: I'm looking for it, sir.

8 THE COURT: Oh, Blackburn. I see. But that's --
9 It was not cited for that proposition, so I'm going to look
10 it up.

11 MR. RIOS: Sir, the case is Bank of Nichols Hills
12 versus Bank of Oklahoma. It's cited at page --

13 THE COURT: I'm sorry, not Blackburn-Nickels &
14 Smith? What page --

15 MR. RIOS: Page 24, sir.

16 THE COURT: Okay.

17 MR. RIOS: It said, Bank of Nichols Hills versus
18 Bank of Oklahoma. It held that the insured did not act in a
19 commercially reasonable manner or in accordance with
20 reasonable commercial standards. And I insist, Your Honor,
21 the underwriters knew that before they made the payment,
22 that Santa Rosa had an interest in the policy. I know this
23 is going to be an issue of fact, but it's an issue that we
24 will be able to prove in court in due form.

25 THE COURT: I'm sorry. You say this appears in

1 what case?

2 MR. RIOS: I'm citing think Bank of Nichols Hills
3 versus Bank of Oklahoma. It's cited at page 24.

4 THE COURT: It's actually 27 through 28. Let me
5 go to that. It's not there either. Well, it doesn't appear
6 on the page that the table of authorities say it appears and
7 it's not on page 24 either.

8 MS. MARCUS: It looks to me like it's on, maybe,
9 page 23, Your Honor.

10 THE COURT: Oh, I see.

11 MS. MARCUS: Yeah. It's page 28 of the .pdf.

12 MR. RIOS: Oh yes. Because I'm referring to the
13 memorandum itself, Your Honor. I'm sorry.

14 THE COURT: Right. Okay, okay. I got it. All
15 right. So is Santa Rosa prepared in any way to protect the
16 Debtor against this?

17 MR. RIOS: I beg your pardon, sir. I missed
18 something there.

19 THE COURT: A number of times during this argument
20 you've said that if the insurers in fact paid the debtor
21 properly under the policy, the debtor has nothing to worry
22 about and if they didn't, they have an independent
23 obligation.

24 MR. RIOS: Yes.

25 THE COURT: But they will be going after the

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1 debtor no matter what under this indemnification provision.
2 Is Santa Rosa able to protect the Debtor against the adverse
3 consequences of that?

4 MR. RIOS: Well --

5 THE COURT: Assume it doesn't win against the
6 insurers, that the insurers acted properly but the insurers
7 run up a million-dollar legal bill in determining that which
8 then they assert against the Debtors. How are the Debtors
9 protected against that from happening?

10 MR. RIOS: Well, it's a self-inflicted harm, Your
11 Honor. They could have avoided it in the first place when
12 they signed the settlement agreement. That's number one.
13 Number two, I think you have to balance the interest and
14 this is -- I mean, we're now addressing an issue which is --
15 it doesn't fall within my realm of knowledge. I believe
16 that's a bankruptcy issue. Right, Your Honor?

17 MS. COLON: Your Honor, if I may, there's -- this
18 is Sonia Colon on behalf of Santa Rosa. In the motion we
19 specifically stated that we will withdraw our part of the
20 claim against Santa Rosa, against the debtor, when we are
21 released of the stay and our claim against the
22 (indiscernible) is adjudicated.

23 THE COURT: No. I understand that portion. What
24 I'm addressing is a different point, which is the debtors
25 liability to the insurers understand the settlement

1 agreement, if it turns out that the insurers are right and
2 Santa Rosa is wrong as far as Santa Rosa having a separate
3 claim against the insurers.

4 MS. COLON: Santa Rosa has the claim -- well,
5 these facts cannot be taken in a vacuum. We had asserted
6 our claims, Your Honor, and after we had asserted our claims
7 they negotiated and they included language therein that
8 they're the only ones with a right to receive this funds.
9 Both parties knew of our right of -- under the policy
10 because we had sent communications to both parties, Your
11 Honor, in the balance of equities between -- which is one of
12 the Sonnax Factors in the balance of equities. Once this is
13 adjudicated we'll withdraw our claim or that portion of the
14 claim against Santa Rosa.

15 Nonetheless, right now, if there's any fees that
16 they're incurring -- they raise that there are going to be
17 incurring fees -- in defending themselves. They're already
18 incurring fees in Puerto Rico with regards to the same mall
19 in a cause of action that they have against a roofing
20 company. So they're already incurring fees in this regard.
21 Thus --

22 THE COURT: I'm sorry. Can you say that -- I'm
23 sorry. I'm sure I followed that. What about the litigation
24 in Puerto Rico at this point? Can you just repeat that?

25 MS. COLON: They already have a cause of action in

1 Puerto Rico which they're actively litigating. I don't know

2 --

3 THE COURT: I'm sorry. Who do you mean by -- the
4 insurer?

5 MS. MARCUS: Your Honor, I can help with that. I
6 think I can help with that.

7 MS. COLON: They have a cause of action against
8 the roof -- against the roofing company that did work in the
9 roof of the building, of the Santa Rosa Mall, and all the
10 profits of that litigation and those litigation costs,
11 everything is being borne by the debtor and the benefits of
12 those, even though it affects Santa Rosa, it was the roof.
13 Santa Rosa doesn't have any rights with those. Everything
14 is being kept by the debtors. So, those allegations that
15 they are going to incur expenses if this is litigated in
16 Puerto Rico which is the exclusive forum of --

17 THE COURT: No, no. I'm sorry. You're going way
18 off where I wanted an answer.

19 MS. MARCUS: Your Honor, can I just --

20 THE COURT: Let me just summarize what --

21 MR. RIOS: May I address that issue, Your Honor,
22 briefly?

23 THE COURT: No. Let me -- please. I'm trying to
24 focus this and the last five minutes got it completely off
25 track so I'm trying to get it back to where it should be.

1 Your response as to whether the debtor should be
2 protected in any way from Santa Rosa being wrong on this
3 issue, I believe, is as follows; the debtors took the risk
4 in entering into that settlement agreement knowing of Santa
5 Rosa's interest in being paid directly by the insurers. Is
6 that a fair summary?

7 MR. RIOS: Well, not directly, jointly, Your
8 Honor.

9 THE COURT: Well, with the insurers.

10 MR. RIOS: Yes.

11 THE COURT: Fine, jointly. But I have one
12 document before me that I think may support that or is being
13 asserted to support that proposition, which was the December
14 14th, 2018 motion by Santa Rosa Mall in this case to compel
15 disclosure of the status of insurance claims and to compel
16 the deposit of any proceeds into escrow exclusively for
17 repair. Right? Is that what we're talking about here?
18 Okay.

19 MS. COLON: Yes, Your Honor. We filed a motion in
20 December.

21 THE COURT: But again, that's assuming, I think,
22 that the money is going to go to Sears.

23 MR. RIOS: Well, like I said, Your Honor, it is
24 going to go to Sears and Santa Rosa. That's our position.

25 THE COURT: But, I think that motion assumes that

1 any settlement proceeds goes to Sears and then is put into
2 escrow. It's not a motion to compel the insurer to pay the
3 money separately into escrow, right? It's dealing with the
4 money coming into Sears, as I read it.

5 MS. COLON: Your Honor, that motion is pre-dated
6 by numerous letters which I don't have in front of me, but
7 numerous letters requesting that Santa Rosa comply to the
8 terms of the lease agreement -- that Sears complies with
9 terms of lease agreement.

10 THE COURT: All right. That's fine but those are
11 --

12 MS. COLON: They hadn't had our --

13 THE COURT: But those are to Sears. Again, the
14 focus here is on whether an agreement whereby Sears gets
15 paid the money -- we shouldn't even be dealing at this point
16 with that issue as far as the insurers are concerned.

17 MR. RIOS: Can I address this, Your Honor?

18 MS. COLON: There were letters to both the
19 insurers and to Sears and in numerous efforts prior to that
20 motion, Your Honor.

21 MS. MARCUS: Your Honor, this is --

22 THE COURT: Are they in the record in connection
23 with the motion before me? They aren't, right?

24 MS. COLON: I assume they are just --

25 THE COURT: Well, I have the motion before me and

1 I don't see them.

2 MR. RIOS: In this particular motion I don't
3 believe there's -- in this particular --

4 THE COURT: Right. And all the other motions have
5 been withdrawn.

6 MR. RIOS: Your Honor, can I respond to your
7 previous question and then I'll allow Sonia to talk about
8 the previous letters, Your Honor, please?

9 THE COURT: Okay.

10 MR. RIOS: The fact that Sears as the primary
11 insurer gets paid and does the adjustment, that is the
12 normal practice, Your Honor. But the normal practice also
13 is when the monies are paid, they're paid to the insured and
14 the landlord and that's what went wrong here. That's what
15 went wrong, and in this case, the underwriters relied
16 extremely -- they took a big risk when they accepted the
17 misrepresentation of a Debtor in possession.

18 I mean, they knew beforehand when they signed that
19 indemnity that Sears was under the protection of the
20 bankruptcy court. So they took a chance. In spite of that,
21 they issued the check and -- knowing that Santa Rosa had
22 written letters to the underwriters, to AIG specifically and
23 to AIG specifically in Puerto Rico and in London. There
24 were two of them. So we have an issue here which is an
25 issue of unfairness and it's an issue of breach of contract,

1 an issue of reasonable expectations which is a principle of
2 insurance law, an issue of bad faith which is also a
3 principle of insurance law, but expressed good faith -- no
4 bad faith.

5 I mean, insurers have to observe good faith and
6 they can expect that the insured, in this case Santa Rosa,
7 would be treated by the underwriter as the underwriter would
8 treat itself and this is not what happened here. And one
9 last comment, Your Honor. It's not going to cost the
10 underwriters a million dollars in Puerto Rico. There are
11 plenty of good lawyers that work for AIG and they're not
12 going to charge a million dollars for this case.

13 If sister counsel, Jacqueline Marcus, was right,
14 this issue could go out with a motion to dismiss. I don't
15 think that's going to happen but it could be very brief. If
16 Attorney Marcus is right it could only require a motion to
17 dismiss. But that's not going to happen and it's never
18 going to cost a million dollars, but it's costing my client
19 Santa Rosa a lot of money because they've had to go forward
20 and restore the building without the benefit of the
21 insurer's proceeds. I would ask sister counsel Sonia Colon
22 to add anything with regards to the notices, Your Honor.

23 MS. COLON: Your Honor, with regards to your
24 question, the letters that I'm referring to are in docket
25 6317, the release of stay, docket 6317, docket 7, 8, and 9.

1 That's the release of January the 7th.

2 THE COURT: I'm sorry. I have the motion, which
3 is 6317. The only exhibit that I have is the -- Oh, so
4 there are other exhibits. Okay. So, Ms. Marcus, what is
5 your response to this?

6 MS. COLON: Yeah. I wanted to -- well, okay. I
7 wanted to speak regarding the bankruptcy perspective but
8 I'll speak then after Ms. Marcus.

9 MS. MARCUS: Okay. Your Honor, first, I'd like to
10 go back to the case that Santa Rosa relies on for this
11 question about who's the appropriate person to pay, Bank of
12 Nichols Hills versus Bank of Oklahoma. In the second
13 paragraph it says -- it was about insurance over a mobile
14 home -- excuse me -- and I'm quoting. In paragraph two it
15 says, "The insurance policy provided that in case of loss
16 Farm Bureau will pay you unless another payee is named on
17 the declarations page, that loss shall be payable to any
18 mortgagee named in the declarations, and that one of Farm
19 Bureau's duties was to protect the mortgagee's interest in
20 the insured building."

21 The declarations page of the policy listed Conseco
22 Finance as the mortgagee. Conseco has a mortgage security
23 interest in the home, and that's the end of the quote from
24 paragraph 2.

25 So unlike the situation here where -- paragraph 53

1 says, insurance company you pay Sears -- in that case, the
2 policy said that the obligation was to protect the mortgagee
3 and that's why that case came out the way it did. That's a
4 very different situation.

5 But I also don't want us to lose sight of the fact
6 that the Debtors have taken the position Santa Rosa is not
7 an insured under the policy under that language and I think
8 Your Honor mentioned it at the last hearing on February
9 24th. There's an obligation in the lease for the Debtors to
10 obtain insurance but we don't believe that that language
11 puts Santa Rosa within the insured language that they're
12 relying on.

13 I can't take issue with the letters that Ms. Colon
14 refers to because there is a letter there to AIG of Puerto
15 Rico that mentions an obligation ostensibly for the monies
16 to be put in a separate account which we also take issue
17 with. But the bottom line here is that the policy is very,
18 very clear and the underwriters complied with the policy and
19 that Santa Rosa really doesn't fall within the language that
20 they're relying on.

21 MR. RIOS: Briefly, we covered that in our
22 response but I'll allow Sonia Colon to respond to the other
23 issues.

24 MS. COLON: Your Honor, at the last hearing -- the
25 February 24th hearing -- you requested us to brief on three

1 gatekeeping issues. A, that the lease agreement grants
2 Santa Rosa right in under the contract of insurance, Two,
3 that the certificate of insurance modified or changed the
4 terms of the contracts, and three, Santa Rosa statutorily
5 direct actions status.

6 In a motion that we filed, and in the discussion
7 that Carlos Rios, who was commissioner of insurance of
8 Puerto Rico did a few minutes ago, it's my proposition that
9 we have complied with the three gatekeeping issues that is
10 set forth in the February 24th hearing.

11 So the only pending issues that we raised in the
12 motion for release of stay and that is whether the
13 settlement's indemnity clause, which was not subject to Rule
14 1919, is enforceable and serves as justification to extend
15 the automatic stay to non-debtor third parties, namely the
16 underwriters, Your Honor.

17 Okay. Although we agree that Section 362 of the
18 Bankruptcy Code may be extended according to some case law
19 to non-debtors in certain unique circumstances, that's not
20 the case that we have before us, Your Honor. The case --

21 THE COURT: Ma'am, I'm going to interrupt you on
22 that point. You're not going to win on that point because
23 the issue here is specifically far more -- the stay doesn't
24 even need to be extended at this point because the immediate
25 effect of any litigation against the underwriters asserting

1 that they paid improperly here given the terms of the
2 agreement is going to result in a claim under the settlement
3 agreement. So this is not your indemnification claim that
4 is the type of claim that's covered in your brief as
5 something that has an immediate effect on the Debtors. So
6 you should focus on --

7 MS. COLON: The claim was --

8 THE COURT: -- ma'am, I'm sorry. You're just
9 going to lose on this point. You're not going to persuade
10 me. Your brief did as good as you could ever do it and it's
11 not going to carry the day. So you should focus on the
12 second point which is whether the settlement agreement on
13 the payment of the proceeds required notice in a hearing.

14 MS. MARCUS: Your Honor, I thought you ruled on
15 that in the last hearing.

16 THE COURT: I thought I did, too, but --

17 MS. MARCUS: We weren't going to argue that --

18 THE COURT: Is there something we missed on that
19 point? Yeah. So I think the real issue here is the one
20 that I did ask you all to brief and, frankly, to me, the
21 rights that you're asserting here are at best rights that
22 give Santa Rosa a claim to the insurance policies and
23 perhaps that claim should have been dealt with when those
24 policies were in hand and of course the litigation history
25 here is tortured.

1 I don't recall whether we ever got to the point
2 where I was given a case that asserted as the Texas case
3 that I previously cited asserts that somehow there's a lien
4 right as to those proceeds, but I'm having a hard time
5 seeing a claim here of the type that I thought might give
6 Santa Rosa a right to stay relief, namely a claim that would
7 not be based on the policies and its rights under the
8 policies, but a separate claim to the insurers under which
9 they would have to pay twice.

10 And I appreciate the length of the brief and the
11 experience of the brief writer, but I don't see, except in
12 very distinguishable circumstances, authority that under
13 these circumstances would require the insurer to pay twice,
14 particularly in light of the terms of the policy itself
15 which have the money coming to Sears.

16 MR. RIOS: Well, Your Honor, will the fact the
17 underwriters were notified -- that they knew about it which
18 they did. We have --

19 THE COURT: But that --

20 MR. RIOS: May I finish, Your Honor?

21 THE COURT: Well, okay. That's fine. Sure.

22 MR. RIOS: Yes. Very briefly, they had
23 constructive notice through their agent, Aon. They had it
24 in their files with the name and everything of Santa Rosa.

25 THE COURT: I accept that. I accept that they had

1 notice. I accept that Santa Rosa said the money should be
2 paid into a separate escrow, but the policy itself doesn't
3 say that, and the case law that you've cited, to me, doesn't
4 say that they paid improperly. What it says is that in an
5 action where they are an actual insured or named insured
6 which at least under the law of certain states would
7 arguably include Santa Rosa here --

8 MR. RIOS: Certainly the laws of Puerto Rico does.

9 THE COURT: Well, I didn't see any Puerto Rico
10 case on point on that in the brief. The case that you
11 cited, I believe, is a case where the other party just
12 wasn't entitled to the money. And here, at best, again,
13 there's going to be an argument as to who -- whose interests
14 were the proper interests and --

15 MR RIOS: That is true.

16 THE COURT: -- to me, that's not the type of right
17 that would let the stay be lifted here.

18 MR. RIOS: Your Honor, I'm missing something here
19 because when this case started there was a discussion with
20 regards to a direct action statute which applies to
21 liability cases, to accident cases. And I am lost if the
22 Court at that time believed that there was a direct action
23 statute, the case would be -- the stay would be relifted or
24 not extended. Why --

25 THE COURT: Well --

1 MR. RIOS: Why would an insured be deprived of a
2 right as a contract act is a party to the contrary?

3 THE COURT: Because in the direct action cases
4 where the stay is lifted to let the personal injury claimant
5 go against the insurer, the Debtor hasn't already been paid
6 the insurance and hasn't signed an indemnity agreement
7 saying, I was the proper one to get it.

8 My recollection of the last hearing was that I
9 basically threw you guys a lifeline saying, if you can show
10 that the insurers had some separate duty to Santa Rosa Mall
11 and that duty is not one flowing from the policy itself that
12 would give rise to an immediate claim under the settlement
13 agreement, then I might say that the stay doesn't apply as
14 I've said it that it wouldn't apply -- shouldn't apply and
15 you all agreed on this -- to Aon, but that doesn't seem to
16 me to be the case here.

17 I mean, again, I started this whole argument by
18 asking about cases that say the insurer might have to pay
19 twice and so far what I'm getting is that when the insurer
20 might have to pay twice is where the payment was clearly
21 made to the wrong party.

22 MR. RIOS: That is correct, Your Honor.

23 THE COURT: And I don't think that's the case
24 here. I mean, Sears is a party too, and you have the
25 paragraph 53 and 19 of the agreement which contemplates

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1 payment and -- look, I understand that the interest was made
2 known to AIG. I see that letter now. And clearly, among
3 the theories that Santa Rosa raised in December of 2018 was
4 that these funds should be dedicated to repairing the mall,
5 but I don't believe that I was ever shown that that interest
6 was something other than a contract interest, and I think
7 that's where we are at this point.

8 MR. RIOS: Well, Your Honor, it's a matter of
9 proof.

10 THE COURT: Can I tell -- I'm sorry to interrupt,
11 sir, but I wanted to get out one other thought. If there is
12 some way to protect Sears on that point -- because I
13 understand your point, which is that, you know, under
14 certain circumstances as a factual matter it may be shown
15 that the insurers acted improperly, so if there's some way
16 to protect the debtor against that not being the case and
17 the insurers coming back and having a legitimate claim
18 against the debtor under the settlement agreement, then I
19 think under Sonnax the stay could be lifted. But I'm not
20 hearing that.

21 Now you said the cost should be minimal, et
22 cetera. I don't know, but I think Santa Rosa should think
23 about that.

24 MS. COLON: Your Honor --

25 THE COURT: Because --

1 MS. COLON: -- if I may --

2 THE COURT: -- I can't -- let me just -- I'm
3 sorry. I was just pausing. My kids complain that my pauses
4 are too long but --

5 MS. COLON: I'm sorry.

6 THE COURT: -- but that's what happens when you're
7 on the phone. I do, again, recognize that there might be a
8 scenario, at least under a couple of the cases that are
9 cited in the brief, where, you know, you might be able to
10 establish that the insurance carriers were on sufficient
11 notice that they shouldn't have made the payment, but that's
12 far from a given here and so that's why I'm focusing on
13 protecting the debtor because I think the stay is in place
14 at this point given the payment and given the settlement
15 agreement.

16 MR. RIOS: Well, but the --

17 THE COURT: So that's where we are. I mean, if
18 the payments haven't been made, then that's a different
19 issue, but I think at this point --

20 MR. RIOS: But there won't be an indemnity then,
21 Your Honor.

22 THE COURT: Well, but I don't know -- indemnity by
23 whom?

24 MR. RIOS: Well, if monies had not been paid,
25 Sears would have not have to issue the indemnity.

1 THE COURT: Oh, I understand, but the money has
2 been paid. That's the difference.

3 MR. RIOS: Well, but -- I mean, why should we be
4 penalized for the wrongdoings of Sears? Sears should have
5 never signed that indemnity, should have never agreed.

6 THE COURT: Well, I've already ruled on that
7 point. I've already ruled on that point so that's a
8 different issue.

9 MS. COLON: Your Honor --

10 THE COURT: Go ahead. Yeah. Go ahead.

11 MS. COLON: It's not --

12 CLERK: Good afternoon, Your Honor.

13 MS. COLON: Oh.

14 CLERK: I do apologize. This is Ry, the court
15 clerk.

16 THE COURT: Well I -- can I interrupt you? This
17 is important. Yeah. Go ahead.

18 MS. COLON: Okay.

19 THE COURT: There's a feature -- no, no, ma'am,
20 this is important. There's a feature of this Court
21 Solutions that is tied, I think, to other people's
22 technology. The hearing can only go on for four minutes on
23 a recorded -- four hours -- on a recorded basis and then it
24 stops so we're going to be cut off in about 20 minutes.
25 Right, Ry?

1 CLERK: That is -- Your Honor, that's correct.

2 THE COURT: Okay. So unless we're going to go
3 past 2:00 we can wrap this up, but if we're going to go past
4 2:00 I'm going ask everyone to hang up at about, you know,
5 five of two, three of two and then sign back in again.

6 MS. COLON: Your Honor --

7 THE COURT: That's just how the technology works.
8 So go ahead, ma'am.

9 MS. COLON: Two issues. Again, I sustain that
10 there are conflict of actions that can be established
11 directly against Sears, but I leave that to Carlos Rios.
12 There were even amendments after Hurricane Maria and those
13 were briefed that gives those rights and those were briefed
14 in our motion.

15 Nonetheless, with regards to the underwriter's
16 claim, we included case law in our brief where we say that
17 an indemnity gives rise to the -- it's crystalized or the
18 claim is crystalized when the indemnity is executed. So if
19 the underwriters had a claim or have a claim against Sears,
20 they show as a result of this indemnity. They should have
21 filed a proof of claim and there's nothing in the record
22 regarding the proof of claim.

23 THE COURT: There's no administrative expense bar
24 date in this case. Correct, Ms. Marcus?

25 MS. MARCUS: That's correct, Your Honor.

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1 THE COURT: All right. So they don't have to have
2 filed a proof of claim.

3 MS. COLON: We included language also in our brief
4 as to how we see that this is an unsecured claim and not
5 necessarily an administrative claim as Sears has
6 represented.

7 THE COURT: It's a post-petition agreement, ma'am.

8 MS. COLON: But they are not defined as the
9 release parties and we included all this discussion
10 regarding as to how the plan reads and how the --

11 THE COURT: No. that's a separate -- I'm sorry.
12 Maybe I misunderstood you. I understand that they are
13 released under the plan, but there's a separate agreement --
14 post-petition agreement, the settlement agreement -- to
15 which they are a party and Sears is a party and if Sears
16 breaches that agreement it gives rise to administrative
17 expense.

18 MS. COLON: An agreement that a clause can be
19 easily (indiscernible) because it's really not enforceable.
20 They did not comply with the bankruptcy requirements or the
21 application requirements before issuing that indemnity
22 clause in that agreement. I think that we can -- in all due
23 respect, Your Honor -- I consider that we can
24 (indiscernible) that clause and leave the agreement and that
25 way Santa Rosa can assert its right in Puerto Rico law

1 against the underwriters and Aon.

2 MS. MARCUS: Your Honor, we're going over things
3 that we've gone over multiple times over the course of the
4 past year.

5 THE COURT: Right. I agree with that. I agree
6 with that. I mean, I dealt with that at our last hearing.
7 I was assuming the enforceability of that agreement which
8 was why I accept if there was some separate cause of action
9 and we've been through that for the last hour or so. So I
10 think we're at the point of diminishing returns at this
11 point.

12 MS. COLON: Your Honor, if there's going to be --
13 if your position has to do that there's been a stay which we
14 disagree, we request, Your Honor, that it be retroactive to
15 extend it and any applicable statute of limitations be told
16 while we appeal then any decision.

17 MS. MARCUS: I'm not sure I understand that.

18 THE COURT: I'm not sure I understand that either.
19 You could separately brief that if you want to. I don't
20 understand what you're focusing on there.

21 MS. COLON: Oh, you see, I can have a second, Your
22 Honor. It's under 108(c) so we can resolve this matter
23 instead of delaying the issue. Just give me a -- just give
24 me a second to speak with co-counsel.

25 MR. CHICO: Your Honor, am I unmuted? Can you

1 hear me?

2 THE COURT: You can go ahead. Yes, is this Ry
3 from the clerk's office?

4 MR. CHICO: No. This is Gustavo Chico, Your
5 Honor. Good afternoon. Thank you for your time. I think
6 what Ms. Sonia Colon was trying to address is that since we
7 can -- if your ruling is not to grant the relief from stay,
8 then to preserve our rights on appeal, we would like to have
9 the -- any tolling period -- any applicable tolling period,
10 if any -- extended so that we can preserve our right to
11 appeal. But we can do that by way of motion, Your Honor.

12 THE COURT: Okay. I mean, I'm looking at 108.
13 I'm not quite sure what -- yes. Unless that period is about
14 to expire, in which case you should argue it now -- but if
15 there's sufficient time so you could brief it you should
16 brief that issue.

17 So this hearing is not only a lengthy hearing
18 today, but covers a prior hearing, which was also lengthy
19 where I gave other rulings. I'm not going to go through
20 those rulings again, but I will state based on today's
21 record, as well as the briefing, that I'm not prepared
22 either to declare the stay inapplicable to the pursuit of
23 claims against the underwriters given that they derive from
24 the debtors' insurance policies and immediately and
25 adversely implicate the debtors with liability under the

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1 insurance settlement agreement and therefore, the primary
2 factor under the Sonnax test, which is the adverse effect on
3 the estate, argues to keep the stay in place.

4 The adverse effect here would be in hundred-cent
5 dollars given the post-petition nature of the agreement and
6 the risk the debtors face. If Santa Rosa were prepared to
7 ameliorate that effect with some particular form of
8 undertaking or protection to the debtors, I would view the
9 matter differently but, that is not the case today.

10 That agreement, to the extent that the lift of the
11 stay would directly affect it, and therefore it would be
12 covered under 362(a), would also be a basis for protecting
13 the underwriters separately under Queenie v Nygard,
14 International 321 F.3d 282, 287 (2d Cir. 2003), where the
15 court through then Judge Sotomayor stated that where there's
16 an immediate adverse impact on the estate third parties will
17 be protected.

18 That's not necessarily extending the stay. It's
19 just interpreting the stay to apply in that type of
20 situation which I believe is the case here. So I will deny
21 the motion and ask the debtors to prepare an order to that
22 affect. You don't need to formally settle it on counsel for
23 Santa Rosa Mall, but you should provide it to them a day or
24 so before submitting it to the Court.

25 If Santa Rosa wants to seek extension or tolling

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1 of a limitations period, it's free to do so on motion to the
2 Court. And you should cc not only the Debtors but the party
3 that would be asserting the statute of limitations, if in
4 fact it was not told, which I'm assuming would be the
5 insurers here.

6 MS. MARCUS: Thank you, Your Honor. We will
7 submit an order as you suggested.

8 THE COURT: Okay. I think that is the last matter
9 on today's agenda and just would like either Ms. Marcus and
10 Ms. Fail to confirm -- Mr. Fail -- to confirm that and
11 otherwise I think this call can be concluded.

12 MS. MARCUS: That's correct, Your Honor. That was
13 the last matter. The rest have been addressed. Thank you
14 very much for your time.

15 THE COURT: Okay. Very well.

16 MR. FAIL: Thank you very much, Your Honor.

17 THE COURT: Who was trying to address me?

18 MR. BERKOWITZ: Good afternoon, Judge Drain, it's
19 Ted Berkowitz from Moritt, Hock & Hamroff. We were advised
20 that our -- the application of the creditor's committee for
21 whom we are proposed counsel might be considered on today's
22 hearing. We did file a certification of no objection.

23 THE COURT: No. That will just be granted. I
24 reviewed it and given that there were no objections and then
25 based on my review, you could email the proposed order to

1 chambers.

2 MR. BERKOWITZ: Thank you, Judge.

3 THE COURT: You should just send the application
4 itself along with it just so I can reference it in the order
5 in case you haven't.

6 MR. BERKOWITZ: Very good. Thank you, sir.

7 THE COURT: Okay. Thank you.

8 MS. MARCUS: Thank you, Your Honor.

9 MR. FAIL: Thank you, Judge.

10 THE COURT: Okay.

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1 C E R T I F I C A T I O N

2

3 I, Sonya Ledanski Hyde, certified that the foregoing
4 transcript is a true and accurate record of the proceedings.

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Sonya M. Ledanski Hyde

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Sonya Ledanski Hyde

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20 Veritext Legal Solutions

21 330 Old Country Road

22 Suite 300

23 Mineola, NY 11501

24

25 Date: April 27, 2020

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